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CURRENT EVENTS.

GROWTH OF FEDERAL JURISDICTION.—We observe in the June number of the *North American Review* an able and thoughtful article by Gen. John Pope on "Some Legacies of the Civil War." In the greater part of the article are discussed subjects which are not sufficiently germane to the law for comment in these columns, but at one point the writer fairly enters our province in considering the remarkable expansion of the jurisdiction of federal courts.

There was naturally to be expected at the close of the war a marked reaction from the extreme views of State Rights which found expression in the doctrine of secession and culminated in civil war. Gen. Pope points out, however, that this reverse movement appears much less in the action of the executive and legislative branches of the general government than in that of the judiciary, and, therefore, classes the expansion of the jurisdiction of federal courts as among "the legacies of the war." He deprecates the tendency of federal courts to absorb the jurisdiction of causes properly cognizable in State courts and says:

"Surely the extent of the jurisdiction of the United States courts and the detail to which it has been carried, find no parallel in the history of those courts for the fifty years before the civil war. It seems rather hard to comprehend how a State government can be said to control its own local affairs when a subordinate court of the United States, by its own process, can seize a railroad within the limits of the State and completely remove it and its employees from State control. And this, notwithstanding the fact that the railroad exists only by permission of the State, and subject to such limitations and conditions as its charter specifies. Not only are the persons employed on the road, as well as the road itself, removed thus summarily from the control of its creator, the State, but it is operated by the court within the State limits by its own employees, whether the State consents or not. The State creates a corporation which is permitted to exist and do business on certain specified conditions. The United States courts seize and operate it without consent of its master and absolutely in violation of the conditions and limitations under which the State consented to allow it to live at all."

Concurring fully in these views, we venture to add a few observations of our own on the subject. We doubt whether the undue expansion of the jurisdiction of federal courts can be fairly regarded as one of the "legacies of the civil war." It is more properly, in our judgment, the result of two causes; first, the increased intercourse personally and in business relations of citizens of different States, thus multiplying the occasions upon which the *legitimate* jurisdiction of federal courts can be exercised; and, secondly and chiefly, the inherent vice of all courts whose powers are not strictly limited by statute law, to magnify their office and absorb and exercise power in any direction they can. From the original organization of the Chancery Court in England down to the latest encroachment of a United States circuit or district court upon the province of State courts the process and the results are the same. There are *nulla vestigia retrorsum*. When a court of equity has once obtained jurisdiction of a cause on one point, it draws to itself all incidental and collateral issues. Thus the jurisdiction of the whole internal carrying trade of the United States is in the course of rapid absorption by the circuits courts of the United States. And, besides, the illustrations so graphically pointed out by Gen. Pope, the process has been greatly facilitated by a decision of the Supreme Court of the United States,[1] rendered in an evil hour and against the vigorous protest of Mr. Justice Miller, one of the foremost jurists that ever sat upon that bench, by which receivers appointed by federal courts in railroad cases are invested with powers nearly absolute. The process is familiar to all lawyers. A State charters a railroad company, it issues bonds, it defaults in the payment of interest (nearly all of them so default), bondholders in other States file in a federal court a bill to foreclose, the court appoints a receiver, the foreclosure suit is protracted to the crack of

[1] Barton v. Barbour, 104 U. S. 126, 137.

doom, and during its pendency the receiver is the corporation, consulting occasionally with the court, and thenceforward the railroad corporation, with all its property, its *personnel*, from the receiver to the brakesman, is as completely withdrawn from the jurisdiction of the State which created it as if it, with all its belongings, had been caught up into the air and transferred to the moon. Nobody can sue the receiver without the permission of the court, and if that is refused, he can only be heard upon petition by a master in chancery, and thus, howsoever strictly legal may be his demand, is denied the right of trial by jury. And the foreclosure suit proceeds *indefinitely*. The receiver runs the road, reports from time to time to the court, receives the money, pays expenses, debts and interest, or does not pay them, and for all the many indefinite years that the simple lawsuit, without probably a single disputable question of law or fact, may last, the State which created the corporation and within whose borders it is operated is as completely ignored as the aboriginal proprietors of the soil upon which the track of the road is laid.

We have long been of opinion that the judiciary system of the United States needs thorough reformation, and that the jurisdiction of federal courts should be more clearly defined and more strictly limited, and that opinion is strengthehed by the consideration that the control of all railroad corporations with the immense interests connected with them is rapidly passing from the States to the federal courts.

NOTES OF RECENT DECISIONS.

COURTS OF SPECIAL AND STATUTORY JURISDICTION — AUTHENTICATION — RECORD. — The Supreme Court of the United States recently decided a case[1] which, though directly applicable to courts martial, is of scarcely less interest to those concerned in cases pending in civil courts of special jurisdiction, or those of general jurisdiction when acting under special statutory powers.

The facts of the case, as stated at great length in the opinion of the court, are very complicated. They amount, however, to this: That, by the finding and sentence of a court martial, Major Runkle had been dismissed from the army; that the war department had approved the sentence by an order in ordinary departmental form, in which it appears affirmatively that the president remitted a portion of the sentence, but it does not appear in that order, or elsewhere in the record of the cause, that the president approved the finding and sentence, otherwise than so far as that fact may be inferred from the remission of part of the penalty.

"Under these circumstances," the supreme court says, "we cannot say it positively and distinctly appears that the proceedings of the court martial have ever in fact been approved or confirmed in whole or in part by the president of the United States."

The *gravamen* of this decision is to reaffirm with some emphasis the rule that in the records of all cases determined by any courts of special jurisdiction, or exercising special powers, every fact essential to the jurisdiction of the court or necessary to authorize the execution of the judgment or sentence must *affirmatively* appear, that nothing can be permitted to depend on inference, howsoever obvious it may be, and that unless there is a strict compliance with this rule, the court is without jurisdiction and its proceedings are utterly void.

The doctrine on this subject is well stated by Chief Justice Marshall:[2]

"The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the facts on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

[1] Runkle v. United States, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1141.

[2] Brown v. Keene, 8 Pet. 112.

EXECUTION SALES OF PERSONAL PROPERTY.

The object of this article is to show, briefly and concisely, the proceeding had under the final writ in suits at law, in reference to the sales of personal property levied upon by virtue thereof and sold thereunder. The name commonly given to the final writ is execution. The word execution is derived from the Latin

Executio, from *ex* and *sequi*, meaning *to follow up*.[1]

"It is not enough that sentence should be given. It is to little purpose that judgment is given unless it be committed to execution." "An execution is the end and fruit of the law." "The effect of the law consists in the execution." "The process of law is a grievous vexation." "The execution of the law crowns the work." "Everything done in our courts according to the office of the law should be committed to execution for the purpose of being carried into effect." "It is a duty of a good judge to cause execution to be issued on a judgment without delay."[2]

The execution is the effectual instrument whereby the finding and judgment of the court are consummated, based upon an adjudication in a contest wherein there was a plaintiff and a defendant, and affects the property of the losing party. The writ of execution on a judgment at law commands the officer to make the money out of the property of the debtor. A sale of the debtor's property is the necessary consequence of the writ, if the money is not paid; the main object of the writ is the making of the money. The levy and sale of property is the consummation of the judgment. For this purpose the plaintiff sues out, or causes to be issued, a writ to the sheriff commanding him to levy for the plaintiff's debt or damages, and costs recovered, either upon the land tenements or goods and chattels, and sell the same, the extent and manner of the execution depending upon the nature of the judgment.[3]

The object of this article, referring as aforesaid only to the sales of personal property, the discussion will be confined to the following heads:

I.—The Execution Creditor.
  (*a*). His rights.
  (*b*). His liabilities.
II.—The Execution Debtor.
III.—The Officer to Whom the Execution is Delivered.
  (*a*). The levy.
  (*b*). The sale.
  (*c*). The return.
IV.—The Purchaser.

[1] Herman on Executions, 1.
[2] *Id.* 5, § 8.
[3] *Id.* 4.

I.—THE EXECUTION CREDITOR. (*a*). *His Rights;* (*b*), *His Liabilities.*—(*a*). In general, the judgment creditor is entitled to his execution immediately after the rendition of the final judgment in his favor. However, in many of the States, a stay of execution may be had by motion, or by statutory enactment, or by appeal, writ of error, or by injunction or otherwise. Yet, as a general rule in all courts of general jurisdiction, there is no stay of execution upon judgment, except for special causes.[4]

But if an execution be not stayed the judgment creditor has the right to an execution without delay according to the form of the judgment obtained and entered. But it must be issued in the lifetime of the judgment debtor, and cannot be issued after his death without opportunity for his heirs to be heard,[5] or the judgment revived against his administrator.[6]

But if partly executed in debtor's lifetime the proceeding under the execution may be completed after his decease.[7]

But the execution must be issued within the time prescribed by the various statutes of different States. Executions are supposed to be actually awarded by the court, but, in general, no such award is actually made; but the attorney after final judgment orders out an execution in conformity with the judgment by filing a *precipe* therefore.

If the execution has been issued and the execution creditor has placed the same in the hands of the officer, he has a right to have it executed, which means levy.[8]

And the officer to whom it is issued is bound to execute it according to the command of the writ without inquiring into the regularity of the proceeding upon which it is granted.[9]

Nor can he refuse because in his opinion it is irregular,[10] or that the same varies from the amount for which judgment was rendered.[11] But process merely irregular and voidable

[4] See statutes of various States.
[5] Wood v. Morehouse, 45 N. Y. 368.
[6] Halsey v. Van Fliet, 27 Kan. 474.
[7] Wood v. Morehouse, 45 N. Y. 368.
[8] Den v. Young, 7 Halst. 300.
[9] Case v. Plymouth, 20 Vt. 469; Cody v. Quinn, 6 Ired. 181; Jordan v. Potterfield, 19 Ga. 139; *In re* Cumins, 4 Ark. 103.
[10] Roth v. Duvall, 1 Idaho, 167.
[11] Parmley v. Hitchcock, 12 Wend. 96.

must be executed.[12] If an officer refuses to execute any judicial process it is a contempt of court, for which an attachment will be granted.[13]

All property of the defendant against whom judgment is rendered, not exempt by law, is, as a general rule, liable to seizure and sale for the satisfaction of the plaintiff's execution;[14] but personal property is the primary fund out of which the execution is to be satisfied and in many States the statute requires the officer to make an entry or endorsement on the execution of *nulla bona*, or "no goods," before subjecting real estate, and where the law requires it the indorsement must be made before a levy on real estate can be sustained.[15] The officer must apply the personal property first, unless the defendant otherwise requests.[16]

For a full discussion of what is personal property and what the judgment creditor has a right to seize and sell, see Herman on Ex., §§ 115–131, as it would be too lengthy for the purpose of this article to dwell any further upon that subject.

(*b*). *His Liabilities.*—1. *As to judgment debtor;* 2. *As to other creditors.*—(1.) *As to judgment debtor.* An execution under which a levy, that is a seizure, has been made, being declared void by competent authority, the party setting it in motion and all persons aiding and assisting him are *prima facie* trespassers for seizing property under it. "Acts which an officer might justify under process actually void but regular and apparently valid on its face, will be trespass against the party. The moment process is set aside for irregularity the party becomes a trespasser *ab initio*.[17] Judgment creditors who indemnify an officer are jointly liable with him."[18] The execution creditor is not protected by irregularity of process as the officer is. He must have a valid judgment.[19]

[12] State v. Page, 1 Speers, 408; Stevenson v. McLean, 5 Humph. 332; Herman on Executions, § 146.

[13] *Id.* § 146.

[14] Sullenger v. Buck, 22 Kan. 30; Stief v. Hart, 1 N. Y. 20.

[15] Koehler v. Ball, 2 Kan. 161.

[16] Smith v. Randall, 6 Cal. 47; Springer v. Johnson, 3 Harring. 515.

[17] Kerr v. Mount, 28 N. Y. 659; Chapman v. Dyatt, 11 Wend. 31; Smith v. Shaw, 12 Johns. 257; Hayden v. Shed, 11 Mass. 500.

[18] Ball v. Loomis, 29 N. Y. 412; Davis v. Newkirk, 5 Denio, 92.

[19] Allen v. Corlew, 10 Kan. 70; Savacool v. Broughton, 5 Wend. 180.

2. *As to other creditors.*—(*a*). *As to judgment creditors of the United States courts;* (*b*). *As to judgment creditors of the State court.*—(*a*). It is a maxim of law that "he who is prior in point of time has the better right." Also that "the law protects the vigilant, not those guilty of laches," and as the lien of an execution out of the United States court commences with the *delivery* of the writ to the officer, and as a lien of an execution issued out of a State court in many instances attaches only at the *seizure* of the property, there is liable to be a conflict between judgment creditors having judgments in these several courts.

As no statutory provision is made to determine priorities between creditors proceeding in federal and State courts, the general principle applies which governs other cases of co-ordinate or equal liens to such creditors, and thus where co-ordinate liens are obtained, one under a judgment of a State and one under a judgment of a United States court, a seizure by a sheriff in virtue of an execution on the State judgment gives priority to the lien of that judgment upon the property seized, except where the United States has a prior right to payment over private creditor.[20]

But if the same goods may be taken in execution at the same time by the marshal and by the sheriff, does this special property vest in one or the other, or in both of them? No such case can exist. Property once levied on remains in the custody of the law, is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction."[21]

Where property has been wrongfully taken by the United States marshal under an execution from the federal court, it cannot be taken out of his custody by replevin from State court.[22]

(*b*). *As to Judgment Creditors of the same Court.*—In many States statutory provisions are substantially as follows: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and *levied* before the

[20] Covel v. Heyman, 17 Reporter, 545.

[21] 1 Am. L. Journal, 224; Hogan v. Lucas, 10 Pet. 400; Pulliam v. Osborn, 17 How. 471.

[22] 1 Am. L. Journal, 222; Wells on Replevin, § 274.

expiration of one year next after its rendition shall operate as a lien on the estate of any debtor to the prejudice of any other judgment creditors."[23]

Having thus treated of the execution creditor as to his right and liabilities, we pass on to consider the execution debtor.

II.—THE EXECUTION DEBTOR is entitled to the exemption provided by the law of the State in which he lives, and in some instances it is either in money or property.[24] And in some States if the execution debtor is a partnership it may claim the exemption, but upon this last proposition the laws of the various States are conflicting and unsatisfactory.[25]

As to *what* is exempt and *when*, the reader will have to consult the statute of the State in which he lives.

The execution must be issued in the lifetime of the defendant, and if not issued before his death it must be revived against the administrator or executor of the estate within the time prescribed by statute.[26]

The effect of the levy upon the execution debtor's property is that it places it in the custody of the law, and the officer who seizes it is the bailee of the law. And the goods are so held until the proper time for their sale, and for a reasonably sufficient time thereafter. And during that time they cannot be interfered with by any other court.[27]

A party, whose property has been taken in execution to satisfy a judgment against him, cannot replevy such property from the officer. For, if this were permitted, there would be no end to delays which the defendant might make, and the execution would not be the end of the law.[28] But an exception t this rule exists when the property is exempt.[29]

But property which an officer has no right to seize cannot be said to be in the custody of the law;[30] or where no valid levy by reason of irregularities, or property is not subject to levy,[31] or where it is the property of a party to the action not served with process,[32] or where the writ is dormant;[33] or if the officer leave it without giving some one charge of it,[34] it is no longer *in custodia*.

Of course it is needless to say that in all cases the writ must be a valid one, properly issued, and served by a competent officer. A levy under an execution remains good against the debtor, although the process becomes dormant as to junior executions, and the sheriff under such levy has the custody and control of the property. And where a sheriff levies an execution upon sufficient property to satisfy it, and through his negligence or misconduct the property is lost, destroyed, or disposed of, so that the defendant is deprived of the benefit thereof, it is a satisfaction of the debt and the plaintiff must seek his remedy against the officer.[35]

But where the debtor has neither paid the debt nor been deprived of his property, the simple act of levying upon it is not a satisfaction, whether the debtor has been permitted to retain the property either by his own misconduct or by his request, or the voluntary act of the officer, because neither works any wrong to him.[36]

Having considered briefly the important essentials as to the execution creditor and the execution debtor, so far as this article will permit, we will take up the next subdivision.

III.—THE OFFICER TO WHOM THE EXECUTION IS DELIVERED. (*a*). There must be an *officer* to execute the process of the court.

[23] Kothman v. Skaggs, 29 Kan. 14; Lammé v. Schilling & Co., 25 Kan. 92. Judgment against a deceased person cannot de revived against his administrator by the judgment creditor without consent of administrator, unless he does it within one year. 23 Kan. 182; Little v. Harvey, 9 Wend. 157; Roe v. Stewart, 5 Cow. 294. For a full discussion of all matters arising from levies upon personal property as between execution creditors, see Herman on Ex., ch. IX, as a further discussion of this proposition at this time would extend this article to too great a length.

[24] Herman on Executions, 112.

[25] 17 Cent. L. Journal, 86.

[26] Scroggs v. Tutt, 23 Kan. 182.

[27] Van Winkle v. Udall, 1 Hill, 559; Van Loan v. Kline, 10 Johns. 129; Hartwell v. Bissell, 17 Johns. 128; Gilbert v. Moody, 17 Wend. 354; Sterling v. Welcome, 20 Wend. 238; Du Bois v. Harcourt, 20 Wend. 41; Wood v. Lake, 13 Wis. 34; Stationery Co. v. Case, 26 Kan. 299; McKinney v. Purcell, 28 Kan. 447; McGlothlin v. Madden, 16 Kan. 466.

[28] Ilsley *et al* v. Stubbs, 5 Mass. 281; Huddler v. Golden, 36 N. Y. 446; 1 Am. L. Journal, 224; Thompson v. Button, 14 Johns. 84; Hoisington v. Armstrong, 22 Kan. 110; People v. Albany, 7 Wend. 485.

[29] Westenberger v. Wheaton, 8 Kan. 169.

[30] Gilman v. Williams, 7 Wis. 329.

[31] Camp v. Chamberlain, 5 Denio, 198.

[32] Sherry v. Schuyler, 2 Hill, 204.

[33] Russell v. Gibbs, 5 Cow. 390; Kellogg v. Griffin, 17 Johns. 274.

[34] Blades v. Arundel, 1 M. & S. 711.

[35] Peck v. Tiffany, 2 N. Y. 451.

[36] *Id.*

"To allow any man to wield the process of courts in his own favor in order to exact such measure of justice as he may think due to himself, would not only lead to abuse and oppression, but would tend to subvert the foundation of private rights and civil liberty."[37]

Without attempting to enumerate the various officers by name who may execute the final process of courts, we pass on to consider their duty in making

(*a*) *The levy.*—Executions are generally issued with the command to the officer to return the same within a specified number of days, or a definite time, and he must execute the process within that time and before the return day. And unless the debt might be lost or put in jeopardy he has all of that time.[38] And he has the right to presume that the whole statutory period allowed for the service of the execution has been given him.[39] But the safe rule for an officer to follow is a strict observance of the command of the writ. He must not show any favor, or be guilty of unreasonable delay, or be guilty of oppression, or make use of greater force and violence than are requisite to execute the process.[40]

No writ must be executed on Sunday or after the return day, or after the death of the debtor, if before the writ is delivered to the officer where the lien is created at the time of the delivery of the writ to the officer.[41]

After property has been lawfully levied upon it must be, so far as the debtor is concerned, legally advertised, and the provisions of the statutes of the various States must be consulted with regard thereto; as the law requires a strict compliance with the statute of the State wherein the sale is made, so far as the debtor is concerned, in order to divest him of his title to the property sold. Being a purely statutory regulation the time is varied in the different States. The object of giving notice of the sale is for the benefit of the debtor, to protect his rights, and to create competition in bidding, to obtain thereby the best price for the property. But if the debtor consents to a sale without advertisement, the sale will be legal.[42] In some States a sale without advertisement will not be void, as the notice is regarded as merely directory.[43] However, it is the duty of the officer in advertising the property levied upon and to be sold, to give a full and complete description thereof, describing its character, conditions and location, so that the public may clearly understand what particular property is to be sold.[44]

Generally whatever is the creditor's right is the debtor's liability, and whatever is the liability of the debtor is the right of the creditor; and the officer must perform his duty according to law, or he will be liable to the creditor or the debtor, or to both of them. After property has been legally advertised, it is the duty of the officer to proceed with

(*b*). *The sale.*—It is essential to the validity of a sale under an execution that there must have been a previous levy.[45] The sale must be made by the same officer making the levy, though his term of office expires before the day of sale.[46] He cannot sell on a levy that has been set aside.[47] A sale must be for cash, unless the parties consent to a sale on credit,[48] and to the highest bidder.[49]

Execution sales are exceptions to the general rule that requires a visible change of possession to perfect the title to the goods sold, as against creditors of the vendor. The creditor may himself be the purchaser, and nothing is necessary after the sale for its validity.[50]

The sale may be made on any holiday or

[37] Sherman v. Boyce, 15 Johns. 447; Brackett v. Winslow, 17 Mass. 160.

[38] State v. Rawlins, 13 Mo. 179.

[39] Dayton v. Lynes, 31 Conn. 578.

[40] Hinman v. Borden, 10 Wend. 367; Brewster v. Van Ness, 18 Johns. 133; McDonald v. Neilson, 2 Cow. 139.

[41] Prescott v. Wright, 6 Mass. 20; Vail v. Lewis & Livingston, 4 Johns. 450; Devoe v. Elliott, 2 Caines, 243. For a full discussion of the Sunday laws consult 24 Am. Law Reg. 378 and note, 1 Atl. Rep. 851.

[42] Burroughs v. Wright, 16 Vt. 619; Walker v. Braden, 34 Kan. 667.

[43] Johnson v. Reese, 28 Ga. 353; Harvey v. Fisk, 9 Cal. 93.

[44] Harrison v. Cachelin, 37 Mo. 79. As to the computation of the length of time an advertisement is to be published, and as to the meaning of a public place, see Herman on Executions, 310, 311.

[45] Bond v. Willett, 31 N. Y. 102; Hamblen v. Hamblen, 33 Miss. 455.

[46] Devoe v. Elliott, 2 Caines, 243; Cord v. Hirsch, 17 Wis. 403.

[47] Kellogg v. Buckler, 17 Ga. 187.

[48] Mumford v. Armstrong, 4 Cow. 553; Bank v. Wakeman, 1 Cow. 46.

[49] Swartell v. Martin, 16 Iowa, 519.

[50] Gates v. Gaines, 10 Vt. 346.

election day.[51] But real estate and personal property cannot be sold together.[52] Each parcel should be put up and sold separately, or in lots best calculated to bring the greatest amount of money.[53] The sheriff should sell just enough property to satisfy the execution and then stop.[54] And this leads us to a brief consideration of—

The bidding at execution sales.—The sale must be at public auction and to the highest bidder, the object being competition, to ensure the highest price. Agreements for the purposes of preventing competition or to suppress bidding against each other by parties, operate as a fraud;[55] the object of the law being to give every debtor a fair sale and a full price.[56]

"An agreement by two or more persons that one of them only will bid at an auction of property and will become the purchaser for the benefit of them all, is illegal, if it be made for the purpose of preventing competition at the biddings and depressing the price of the property below the fair market value. *Aliter*, if the purpose of the agreement be to enable each of the parties to become a purchaser when he desires a part of the property offered for sale, and not the whole lot, or if the agreement be for any other honest and reasonable purpose."[57]

To make a purchase void it must be proved that the property obtained was sold at an undue value and by false representations.

The sale must be made to the highest bidder, and when the bid is accepted the contract is complete and the bidder becomes liable for the purchase money, and the bidder acquires an independent right to have the sale completed.[58] But the bid of an infant, or of an irresponsible person, or any other bid which would embarrass the sale, may be rejected.[59] A bid may be made by letter, and if the officer announces it at the time of the sale and there is none higher, he may sell under it.[60]

The adjournment of a sale nullifies a bid.[61] A bid may be withdrawn at any time before the property is actually struck off.[62]

We will now consider

(*c*). *The return.*—Whenever proceedings are had under an execution, the officer must return the same with a true certificate of his proceedings had thereunder. If that return is false the party aggrieved has his remedy upon it.[63]

It is the duty of the officer to make out his return and file it with the clerk, and it does not become a matter of record until actually filed in the clerk's office, and until the execution is returned the officer needs not the authority of the court to make or amend his return. Till then it seems to be under his own control and in his own power. It seems to be the rule of the common law that an officer who has begun the service of an execution shall proceed and complete it, though he go out of office in the meantime.[64]

Where the highest bidder at a sheriff's sale refuses to take and pay for the articles he has bid off, the sheriff *may* set it up again and sell it to the highest bidder at the second attempt;[65] but he is not *bound* to re-sell. The relation of debtor and creditor exists between the officer and purchaser by force of the contract of sale, and he is left to enforce his rights by the usual remedy, unless he elects to rescind the contract of sale.[66] The officer may resell or take the next highest bid;[67] but after unconditional delivery of the property, he cannot resell, for the sale is then complete.[68] If the money is not paid by the purchaser, the officer may bring an action against the defaulting bidder for the amount of the accepted bid, and he may do this even after he has returned the execution, for the action is founded upon the contract arising from the bid and its acceptance, and

[51] King v. Platt, 37 N. Y. 155.
[52] Sheldon v. Soper, 14 Johns. 352; Cresson *et al.* v. Stout. 17 Johns. 116.
[53] Sheldon v. Soper, 14 Johns. 352; White v. Watts, 18 Iowa, 74; Cunningham v. Cassidy, 17 N. Y. 276.
[54] Todd v. Hoagland, 36 N. J. L. 352.
[55] Packard v. Bird, 40 Cal. 378; Dudley v. Little, 2 Ohio, 508; Brisbane v. Adams, 3 N. Y. 129; Hawley v. Cramer, 4 Cow. 717.
[56] Cocks v. Izard, 7 Wall. 559.
[57] Pippen v. Stickney, 3 Met. 384; Bradley v. Kingsley, 43 N. Y. 534.
[58] Gray v. Case, 51 Mo. 463; Armstrong v. Vrooman, 11 Minn. 220; Walker v. Braden, 34 Kan. 660.
[59] Kenney v. Showdy, 1 Hill, 544; Hobbs v. Beavers, 2 Ind. 142.
[60] Herman on Executions, 318.
[61] *Id.*
[62] Fisher v. Seltzer, 23 Pa. 308.
[63] Pardee v. Robertson, 6 Hill, 550.
[64] Welsh v. Joy, 13 Pick. 482.
[65] Wilson v. Loring, 7 Mass. 310.
[66] Herman on Executions, 325.
[67] *Id.*
[68] Walker v. Braden, 34 Kan. 660.

not upon the judgment and the execution upon which the sale was made.[69]

In conclusion, the highest responsible lawful bidder is the

IV.—Purchaser of the Property. And after he has purchased the property he must pay the price; and after he has received possession of the property the sale is completed and the title vests in him. The purchaser at an execution sale cannot be heard to complain that the notice of such sale was defective.[70] Under an execution sale by an officer there is neither an express nor an implied warranty of title or soundness; no ministerial officer has power to make any terms different from those presented by law; a purchaser takes just such title as the debtor has. The officer sells the debtor's property in the thing whatever that may be.[71] The rule *caveat emptor* applies to all execution sales.[72] Where the execution creditor is the purchaser he stands on the same footing as the stranger,[73] but an innocent purchaser where he gets nothing by the sale may in equity have redress against the execution debtor whose debt he has paid.[74] Where a stranger's property is sold and he recovers it from the purchaser, the purchaser may recover the money from the plaintiff and the plaintiff may have the return and the levy quashed,[75] and a new execution issued.

Only the interest which an execution debtor has in the property is levied upon and sold, and the purchaser at such sale takes the property subject to any valid and subsisting lien which may exist against it, and the sheriff is not warranted in accepting from the purchaser less than the amount of the bid, or in crediting the purchaser upon the bid with any mortgage debt he may claim against the property sold.[76]

If the execution creditor is the purchaser the officer may deliver him the property without receiving the money; the amount of the sale may be applied as a satisfaction to the amount of the bid on the judgment.[77]

A sale made by an officer on execution must be regarded as a legal transfer of the property, although the officer may not have conformed to the requirements of the statute in making the sale.[78]

A void judgment is in legal effect no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself all proceedings founded upon it are equally worthless. It neither binds nor bars any one; all acts performed under it and all claims flowing out of it are void. Parties attempting to enforce it may be responsible as trespassers. A purchaser at the sale by virtue of its authority finds himself without title and without redress.[79]

Where an execution creditor purchases at execution sale and his jugment is subsequently reversed and restitution awarded, the title revests in the execution debtor, but where before the reversal the execution creditor conveys to a stranger who purchases in good faith, he will hold the title unaffected by the reversal. An exeption to this rule is the sale of exempt property; the purchaser acquiring no title can convey none even to a stranger.[80]

A purchaser at a sheriff's sale of personal property of A upon an execution against B, obtained no title thereto.[81]

There is always a difference between *void* and *voidable* judgments. An erroneous judgment or execution is not void. It can be set aside only by direct attacks by parties having an interest in it and not by collateral attack in any other proceeding. No one but the defendant in an irregular execution can take advantage of its irregularity.[82]

Van Syckel & Van Syckel.

Girard, Kansas.

[69] *Id*; Adams v. Adams, 4 Watts, 161; Armstrong v. Vrooman, 11 Minn. 220.

[70] Walker v. Braden, 34 Kan. 660.

[71] Herman on Executions, 330, and cases there cited.

[72] Wheatley v. Tutt, 4 Kan. 195.

[73] Vattier v. Lyttle, 6 Ohio, 477.

[74] Julian v. Beal, 26 Ind. 220; Hawkins v. Miller, *Id.* 173.

[75] Richardson v. McDougall, 19 Wend. 80; Zeigler v. McCormick, 13 N. W. Rep. 28.

Walker v. Braden, 34 Kan. 660.

[77] Nichols v. Ketcham, 19 Johns. 84; Russell v. Gibbs, 5 Cow. 390.

[78] Herman on Executions, 338.

[79] Freeman on Judgments (2d ed.), § 117; O'Brien v. O'Brien, 3 N. W. Rep. 233, bottom paging; Carpenter v. Stillwell, 11 N. Y. 61; Wills v. Chandler, 2 Fed. Rep. 273; Place v. Riley *et al.*, 98 N. Y. 1.

[80] Vogler v. Montgomery, 13 Am. L. Reg. 244.

[81] Bryant v. Whitcher, 12 Am. L. Reg. 598; s. c., 52 N. H.—Barry v. Mc Grade, 14 Minn. 163; Gil. 126.

[82] Wilkinson's Appeal, 10 Am. L. Reg. 538; s. c., 65 Pa. But see Mastin v. Gray, 19 Kan. 458.

LIFE INSURANCE—SUICIDE—SANE OR INSANE —EXPERT EVIDENCE.

STREETER, ADM'R V. WEST UNION MUTUAL LIFE AND ACCIDENT INSURANCE CO.

Supreme Court of Michigan, February 15, 1887.

1. *Insurance Policy—Sane or Insane.*— When a policy provides that it shall be void if the assured shall take his own life, whether sane or insane, such policy is not void if he takes his life when in a state of unconsciousness and involuntarily.

2. *Expert Testimony.*—Where the opinions of witnesses are based upon previous knowledge of the mental condition of the assured and not upon knowledge or observation of his acts or condition at the time he took his life, such testimony does not tend to prove that the act was involuntary or the deceased unconscious at that time.

Error to superior court of Detroit.

Action on a life insurance policy. Upon the trial the court directed a verdict for defendant.

CHAMPLIN, J., delivered the opinion of the court:

The policy of insurance introduced in evidence in this cause contained the following clause: "If the insured shall, within three years of the date of this policy, die by his own hand, sane or insane, this policy shall become and be null and void." Within three years from the date of the policy the insured died from the effects of a pistol-shot wound inflicted upon himself. The evidence tended to prove that when he shot himself he was insane. Witnesses expressed the opinion that his mental condition was such that he was unable to control any of his physical actions that might have been called upon to carry out any one of his impulses. It is not claimed that the self-destruction of the insured was accidental. The court below construed the language of the policy above quoted as covering all acts of self-destruction, whether felonious or not, and was meant to excuse the company from liability when the suicide was the result of insanity, and in itself an insane act; that the words "sane or insane," in this case, not only meant to qualify the meaning of "die by his own hand," as defined by law, but that they actually do so. Counsel for plaintiff contends that the phrase, "die by his own hand," had a well-understood signification in the law of insurance; that when the defendant insurance company selected such expression, and inserted it in its policy, it should be held to have used it in its legal sense, namely, as meaning, "shall voluntarily and intentionally take his own life;" that, by adding the words "sane or insane," the defendant had not caused the expression, "die by his own hand" to mean something which it did not mean without such addition, but had used a combined expression, which was tantamount to saying "shall voluntarily and intentionally take his own life, sane or insane;" that if the expression, "die by his own hand," and "sane or insane," were incongruous or inconsistent, the beneficiaries under the policy should not suffer by it; that in his opinion, however, they were not incongruous or inconsistent, but could legally and scientifically combine, and stand together without conflict, as both voluntary and involuntary self-killing were compallible with insanity.

We are unable to agree with the construction which the learned counsel for the plaintiff places upon the clause of the contract in question. The subject is not a new one in the courts. The precise question came before the United States Supreme Court in Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, when Mr. Justice Davis, in an able and exhaustive opinion, so fully reviewed the subject, and the construction to be placed upon the term "sane or insane," as to render a further discussion of the subject unnecessary. It has also received attention in the following cases: De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232; Pierce v. Travelers' Ins. Co., 34 Wis. 389; Salentine v. Mutual Ben. Life Ins. Co., 24 Fed. Rep. 159; Riley v. Hartford Life & Annuity Ins. Co., 25 Fed. Rep. 315.

It was said by Mr. Justice Davis in Bigelow v. Insurance Co., *supra*, that "the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing." It was claimed in this case that, if the insured was unconscious of the act he was committing, it was merely an accident; and was not within the intent and meaning of the terms of the policy. But the learned judge said that the term, "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the act itself. He further said that "Bigelow knew he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences."

If a person does not act in a state of unconsciousness, or involuntarily, whether he be sane or insane, such act is nothing more or less than accidental, and would not operate to forfeit the policy. The record in this case does not disclose such a state of facts. There was no evidence that the act was involuntary, or that Morrer was unconscious when he inflicted upon himself the fatal wound. The only testimony which can be claimed to have any bearing upon the subject is that given in answer to questions calling for the opinion of the witnesses as to whether Morrer's insane mental dondition affected his ability to control his own physical actions. These witnesses did not claim to have been present at the time, or to have been acquainted with the circumstances of the transaction, but they based their opinion upon what they had observed of his mental con-

dition previous to the act of self-destruction. Such testimony was entirely destitute of any probative quality. The court was right in disregarding it. The same point was passed upon in De Gogorza v. Knickerbocker Life Ins. Co., *supra*. The policy covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission. Upon the facts presented by this record, the charge of the trial judge was correct.

Error is assigned that the court did not permit the witness, Clara M. Morrer, to testify in relation to conversations with Samuel C. Morrer concerning his fall. This assignment is founded upon a mistake. The court did not permit the witness to testify fully as to what her husband said. She testified to what complaint he made, and also to what he said.

It is also assigned as error that the court refused to permit the plaintiff to go to the jury upon the question of how far the accident alluded to in the testimony produced the condition of mind resulting in the killing. There were no requests to charge presented to the court by either party, some testimony was introduced tending to show that, about six weeks before the insured shot himself, he fell upon the sidewalk, and received an injury at the base of the brain; and several witnesses testified that, after that time, they observed a marked change in his demeanor, and that he complained of pain in the back of his head, and they attributed his insanity to his fall. He shot himself April 10, 1885. But one witness, Mr. Stanly Stout, testifies to his strange and unnatural demeaner in the fall of 1884; that he never seemed to know exactly what he was about, or to have control of his faculties—sitting silent and moody, and lingering for hours at a time, while constantly professing to be in haste. He does not remember any particular change in his manner or actions shortly before his death. So that his fall seems not to have been the producing cause of his insanity, but may have had an accelerating effect upon the predisposing cause. Granting, however, that it was the producing cause of his insanity, and by reason of his insanity he purposely took his own life, it does not logically follow that the suicide or self-destruction was caused by the accidental fall and injury. The cause and effect are too remote and unconnected with each other. Most, if not all cases of insanity, are the result of disease, either of the brain or nervous system, and such disease may in many instances be caused by accident; but what phase of insanity the diseased mental condition may assume it is impossible to tell, or to trace to antecedent causes. In this instance, whether the injury received by the fall was the cause of the killing was too conjectural to be submitted to the jury as a direct cause of self-destruction.

The judgment of the superior court is affirmed.

NOTE.—Words of a similar import and intention in insurance policies to those adjudicated upon in the principal case have received considerable attention from the various courts.

These conditions are forfeitures, and forfeitures have never been favored in the law and receive a strict construction, yet, if upon a reasonable construction it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the court to enforce the contract as the parties have made it. It is neither unlawful nor against public policy for a contract of life insurance, to stipulate that, upon certain conditions or contingencies, the policy shall become void.[1]

A forfeiture will not be enforced unless it is clearly demanded by the established rules governing the construction of written agreements. And when the policy contains inconsistent or contradictory provisions, it is the rule that the provision most favorable to the assured will be adopted.[2]

Courts will construe a contract of insurance liberally, so as to give it effect, rather than to make it void. Conditions which create a forfeiture will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy.[3]

In Burkhard v. Travelers' Ins. Co.,[4] it was held that, "when a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction."

And where an insurance policy contained two inconsistent stipulations covering the same subject-matter, the one general, and providing among other things, that upon certain conditions the policy should become absolutely void, and the other separate and distinct, and providing that upon the very same conditions the company might, by proper steps, avoid the policy, the latter stipulation will govern.[5]

And where the policy contained the provision, that it shall be null and void in case the insured "shall, under any circumstances, die by his own hand," it was held that, whilst it was competent for the parties to qualify or restrict the popular meaning of words in a policy, yet proper construction of the proviso requires that the words "under any circumstances" be disregarded as too general and indefinite.[6]

And in another case it was held that, where the proviso was that if the assured shall "die by his own hand or act, voluntary or otherwise," the words otherwise, etc., were of uncertain meaning and void.[7]

But in Riley v. Hartford Life & Annuity Ins. Co., it was held that, when a life insurance policy provides that it shall be void in case the assured shall die "by self-destruction, felonious or otherwise, the proviso includes all cases of voluntary self-destruction, sane or insane.[8]

In Waters v. Conn. Mut. Life Ins. Co.,[9] it was said

[1] Bloom v. Franklin Life Ins. Co., 97 Ind. 478; Douglass v. Knickerbocker Life Ins. Co., 83 N. Y. 492.
[2] Mouler v. Am. Life Ins. Co., 111 U. S. 335; Nat. Bank v. Ins. Co., 95 U. S. 673.
[3] Carson v. Jersey City Ins. Co., 43 N. J. L. 300; S. C., 39 Am. Rep. 584; Franklin Life Ins. Co. v. Wallace, 93 Ind. 7; Bliss on Ins., § 385.
[4] 102 Pa. St. 262.
[5] S. C. Ind. (1886), 4 N. E. Rep. 582.
[6] Schultz v. Ins. Co., 40 Ohio, 217.
[7] 5 Big. Life, etc. Rep. 42.
[8] 25 Fed. Rep. 315.
[9] 2 Fed. Rep. 892.

that a man does not "die by his own hand" within the meaning of a clause in a life insurance policy, although he puts an end to his life, if impelled to do the act by an insane impulse which he has no power to resist, or commits the act without a knowledge at the time of its moral character and its consequences and effects.

In Phadenhauer v. Germania Life Ins. Co.,[10] where the policy contained the clause rendering the same void if the assured "shall die by suicide or by his own hands," the court held that the condition referred to the voluntary act of the assured when he was capable of distinguishing between right and wrong, and that, if the assured took his own life when incapable of so distinguishing, the policy would not be avoided.

It was said in Copper v. Mass. Mut. Ins. Co.,[11] that, where a life insurance policy provided that it should be void if the "assured shall die by suicide," and the assured took his life by hanging himself with a rope, that there can be no recovery on the policy, although the act of self-destruction was committed under the influence of insanity, in the absence of evidence proving delirium or madness, or that the act was involuntary.

The policy of insurance in Adkins v. Columbia Life Ins. Co.,[12] provided that, in case of the death of the assured "by his own act or intention, whether sane or insane," the company should only be liable for the net value of the policy at the time, and the court held that embraced an intentional self-destruction by an insane man, provided that he was conscious at the time of the physical nature and consequences of his act, and intended to destroy his life, although he was not conscious of the moral quality or consequences of the act.

But by the Supreme Court of Pennsylvania it was held that such a condition is not avoided by the self-destruction of the assured when insane, although he meant to kill himself and knew that death would be the result of his act.[13]

And it was held in Edwards v. Travelers' Life Ins. Co.,[14] that a condition in a policy of insurance that it shall be void if the assured shall die by suicide, whether the act be voluntary or involuntary, has no application when the insured, a sane man, kills himself by accident; and that, in the case of the death of the insured by his own act, there must be some proof, or at least a presumption, that such act was intentional on his part. The court say: "Assuming, however, that he died from prussic acid poisoning, there was no evidence as to how it was taken, or that it was taken knowingly. But it is argued that, whether ignorantly or designedly, is wholly immaterial, and that the court fell in error in the charge to the jury that, in order to reach a verdict for the defendant, they must find, not only that there was poison taken sufficient to cause death, but also that the assured took it knowingly and not by mistake. No authority is produced sustaining this position, which seems wholly at variance with justice and common sense. Test it by illustration: A sportsman is shot to death by the accidental discharge of his own fowling piece; a woodman is killed by the premature fall of a tree which he himself has felled; an infectious cut from his own scalpel causes the death of the antagonist. Strictly speaking, each dies by his own hand; but can it be seriously maintained that a life policy providing that it shall be void if the insured 'shall die by suicide,' whether the act be voluntary or involuntary, would be avoided in such circumstances? No court has yet announced a doctrine so untenable, and it is believed that none ever will. Life insurance is intended to cover just such risks. Its chief benefits are to be found in sudden death. But the precise question was determined in Penfold v. Universal Life Ins. Co., 85 N. Y. 317."

In an action on a life insurance policy, if there be a doubt whether the death was the result of accident or suicide, the doubt should be solved in favor of the theory of accident.[15]

The death of a person who, while insane, hangs himself, is not a death wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries, within the meaning of an exception in an accident policy of insurance. The construction of a policy of insurance is controlled by the legal effect of the language used, and not by a statement in the application of the understanding of the assured of what the insurance will extend to.[16]

Where the policy contained the proviso that, if the insured should "die while violating any law," all rights thereunder should be forfeited, it was held that where the insured went into the treasury department of the State in the day time and demanded money belonging to the State and was given $500, and then left the department and had nearly reached the outer door, when he met a policeman and was shot and killed, that he was not killed while violating the law, and the policy was not forfeited.[17]

Death produced by an overdose of laudanum, taken by mistake while in a drunken condition, is not "dying by his own hand," but death from laudanum, taken with the intent to destroy life, though while in a drunken condition, would be dying by his own hand.[18]

In an action on a life insurance policy containing a provision that, in case the assured should die by his own hand, the policy should be void, it appeared that the assured took his own life by shooting himself. The judge charged the jury that, if the assured was incapable of determining whether the act was right or wrong, the company was liable, and it was held that the charge was erroneous. Rapallo, J., says: "I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was was volunatry and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse or want of power of will or self-control, is sufficient to take the case out of the proviso. The contrary has been held in several cases, and the doctrine of Borradaile v. Hunter, 5 Man. & G. 639, adopted. Dean v. Am. Mut. Life Ins. Co., 4 Allen, 96; Nimick v. Ins. Co., 10 Am. Law Reg. (N. S.) 102. In the case of St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush, 268, the Court of Appeals of Kentucky was equally divided."

Borradaile v. Hunter is the leading English case upon this subject. The question there was as to the effect of moral insanity upon the insurer's liability. The policy sued on in that case provided that, in case

10 7 Heisk. 567.
11 102 Mass. 227.
12 70 Mo. 27.
13 Conn. Mut. Life. Ins. Co. v. Groom, 86 Pa. St. 92.
14 20 Fed. Rep. 661.
15 Keels v. Mut. Reserve Fund Life Assn., 29 Fed. Rep. 198.
16 Accident v. Crandall, 7 S. C. Rep. 685 (March 7, 1887). There is a very elaborate opinion on this case in the court below, which is reported in 25 Am. Law Reg. (1886), 354, and also a very through note appended.
17 Griffin v. Western Mutual Benevolent Assn., S. C. Neb. (1887.)
18 Equitable Life Assn. Soc. v. Patterson, 41 Ga. 338.

the assured "shall die upon the seas or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever, unless a license be obtained from a court of directors of the said company, *shall die by his own hands* or by the hands of justice, or in consequence of a duel," it should be void. The jury returned a verdict "that Mr. Borradaile voluntarily threw himself from a bridge with the intention of destroying life, but at the time of committing the act he was not able of judging between right and wrong," and the verdict thereupon was rendered for the defendant. Upon appeal it was held that this was correct, and that the mere fact of the assured's ability to judge between right and wrong was immaterial. This case has sometimes been referred to as an authority for the proposition that, where a person intentionally takes his own life, it is to be considered a voluntary death "by his own hand," within the meaning of the phrase as used in policies of insurance, whether the act is the direct result of insanity or not; but it can hardly be said that it goes that far. The rule here enunciated has been followed by several New York decisions,[19] but has been rejected by the Supreme Court of the United States in the leading case of Life Ins. Co. v. Terry.[20] This was a suit upon a policy providing that, "if the said person whose life is hereby insured * * * shall die by his own hand * * * this policy shall be null and void." In delivering the opinion in the supreme court, Justice Hunt said: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery if the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

This case has been approved and followed by the same court in two later cases,[21] in the latter of which Mr. Justice Gray, in delivering the opinion, said, "that an act of self-destruction is not to be considered the act of the insured when his reason is so clouded or disturbed by insanity as to prevent his understanding the real natare of the act as regards either its physical consequences or moral aspect." This rule has been followed in several States.[22]

In Schultz v. Ins. Co.,[24] it was held that, where a policy of insurance as conditioned to be void, if the assured "shall die by his own hand under any circumstances," is not avoided by the suiciding of the assured while insane, although he understood the act and intended the result.

In Schneiderer v. Ins. Co.,[24] it was alleged in the pleading that while the assured, who was traveling in a railway car, was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing, he voluntary arose from his seat and walked unconsciously to the platform of the car and fell to the ground, and it was held that this constituted a good cause of action upon a policy of life insurance.

In Breasted v. Farmers' Ins. Co.,[25] it was observed by the court, that a death by accident and a death by the party's own hand when deprived of reason, stands on the same principle in the same category. In both cases the act is done without a controlling mind.

The decision in the principal case is certainly in the line of the majority of decisions in this country.

Springfield, Ohio. WM. M. ROCKEL.

19 Van Zandt v. Ins. Co., 55 N. Y. 169; Fowler v. Ins. Co., 4 Lans. 202; Weed v. Life Ins., 41 N. Y. 476.

20 1 Dill. 403; 15 Wall. 580 (1872.)

21 Ins. Co. v. Rodel, 95 U. S. 232; Ins. Co. v. Brougham, 109 U. S. 121.

22 Life Assn. of Am. v. Waller, 57 Ga. 553; Phadenhauer, v. Ins. Co., 7 Heisk. 567; Ins. Co. v. Moore, 34 Mich. 41; Schultz v. Ins. Co., 40 Ohio St. 217; Ins. Co. v. Groom, 86 Pa. St. 92; Ins. Co. v. Isett's Admr., 74 Pa. St. 176.

23 40 Ohio St. 217.

24 58 Wis. 14.

25 8 N. Y. 306.

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1. ACCORD AND SATISFACTION — Executory. ——An agreement to accept a deed of a third party without its delivery, is not an accord and satisfaction.—*Burgess v. Denison P. M. Co.*, S. J. C. Me., March 8, 1887; 9 Atl. Rep. 726.

2. ACTION—Note not Due—Attachment—Amendment—Costs.——Though an attachment in a suit on a note not yet due is dismissed, yet the suit may be continued on an amended petition, the note having in the meantime matured, but the plaintiff must pay all costs till the filing of the amended petition.—*Arnold v. Willis*, S. C. Tex., May 10, 1887; 4 S. W. Rep. 485.

3. ADMINISTRATOR DE BONIS NON—Holiday—Waiver—

Trover—Parties.——Where a complaint is filed on a legal holiday and the defendant pleads a general denial, he waives the irregularity. An administrator *de bonis non* may sue in trover parties to whom the first administrator had paid a note belonging to the estate, and although his sureties on his official bond and the maker of the note are also liable, they are not necessary parties to that suit.—*Ullman v. Verne*, S. C. Tex., June 3, 1887; 4 S. W. Rep. 548.

4. ADVERSE POSSESSION—Exclusive.——To constitute adverse possession it is necessary that it be adverse to the claims of others, and be actual and exclusive. Merely placing rails for a fence on the land is not sufficient.—*Richards v. Smith*, S. C. Tex., April 12, 1887; 4 S. W. Rep. 571.

5. APPEAL—Assignment of Errors—Brief—Usury—Building Associations.——In Texas, the failure of an appellant to set forth in his assignment of errors the alleged errors complained of, is not remedied by his stating them fully in the brief of his counsel. An agreement by a party to take stock in a building association, to accept a loan of forty-three per cent. of $500, and to pay interest on $500, is usurious. A sale of stock in such a company to pay usurious interest is void.—*Jackson v. Cassidy*, S. C. Tex., May 17, 1887; 4 S. W. Rep. 541.

6. APPEAL—Certiorari—Trial—Review.——When an action appealed from a court for trial of small causes is ready for trial, it is the duty of the court to try it; if it is taken up by *certiorari* it will not be reversed, unless the errors appear on the record.—*Barclay v. Brabston*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 769.

7. APPEAL—Pleadings—Account—Reversal.——Where, in an action for work done, the account consists of many items, some of which were authorized and others not, a judgment for the entire amount should be set aside.—*Denver, etc. R. Co. v. Neis*, S. C. Colo., May 18, 1887; 14 Pac. Rep. 105.

8. APPEAL—Proceedings Below.——A motion on appeal to consider only the judgment roll, because the other proceedings below were not had within the time allowed by law, should be overruled, when the objections were not raised in the lower court.—*Hegard v. California I. Co.*, S. C. Cal., June 14, 1887; 14 Pac. Rep. 180.

9. APPEAL—Record—Time.——A court cannot settle and sign a case for the appellate court, unless it has been made and served within the legal time, and a judge's certificate that it was duly served will not overcome a specific recital in the record showing the contrary.—*Gimbel v. Turner*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 255.

10. APPEAL—Removal of Receiver.——Where a receiver was appointed as ancillary to the main proceedings at the instigation of the plaintiff, he may be removed on motion, when a demurrer has been sustained to the petition and judgment given for the defendant, though the plaintiff has appealed.—*Baughman v. Superior Court*, S. C. Cal., June 22, 1887; 14 Pac. Rep. 207.

11. APPEAL—Satisfaction of Judgment.——When a defendant, in an action of trespass, satisfies the judgment therein, another defendant cannot appeal, the judgment being extinguished.—*Sager v. Moy*, S. C. R. I., May 4, 1887; 9 Atl. Rep. 847.

12. APPEAL—Sureties—Qualifying.——An appeal will not be dismissed because the sureties on the appeal bond failed to qualify, when it does not appear that they are insufficient.—*Smith v. Nescatunga Town Co.*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 246.

13. APPEAL—Time of Taking.——Under U. S. Rev. Stat. § 1008, an appeal must be taken within two years after the rendition of the judgment, there being no disability.—*Whitsitt v. Union, etc. Co.*, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1248.

14. APPEAL—Weight of Evidence—Bill of Exceptions.——An objection that the evidence does not support the verdict will not be considered on appeal, when the bill of exceptions shows affirmatively that all the evidence is not contained therein.—*Gibbs v. Wall*, S. C. Colo., June 15, 1887; 14 Pac. Rep. 216.

15. APPEAL—Weight of Evidence—Reversal.——When the evidence was most cogent in showing the defendant to have burned the plaintiff's premises, in an action of damages therefor, a judgment for the defendant was reversed.—*Garrett v. Greenwell*, S. C. Mo., May 16, 1887; 4 S. W. Rep. 441.

16. APPEAL—What Appealable—Judgment—Interpreting a Judgment.——When a judgment is rendered, interpreting a former appealable judgment, by incorporating in it a feature which, if it had been expressly contained therein, would have supported an appeal to this court, such latter judgment will also be appealable.—*Factors', etc. Ins. Co. v. New Harbor, etc. Co.*, S. C. La., May 9, 1887; 2 South. Rep. 467.

17. ARBITRATION—Attendance of Parties.——Under § 3539 of the code of Alabama, the parties in controversy in proceedings before arbitrators have the right to attend when testimony is produced, and an award will not be made the judgment of the court when it appears that two witnesses were examined by the arbitrators without the consent and after the retirement of the parties.—*Rosenau v. Legg*, S. C. Ala., May 6, 1887; 2 S. E. Rep. 441.

18. ASSIGNMENT—Accounts—Garnishment.——Where a boarding-house keeper has an agreement with a railroad that it will deduct from the pay of their employees the amount each one owes him for board, and remit the money to him, and he borrows money from a bank by agreeing to turn over to it the payment received at the next pay-day, to which arrangement the railroad assented, there is an equitable assignment of such money to the bank, which need not be in writing, and a creditor of the boarding-house keeper cannot garnish the railroad therefor.—*Chamberlin v. Gilman*, S. C. Colo., May 18, 1887; 14 Pac. Rep. 107.

19. ASSIGNMENT—For Creditors—What is—Statute.——An assignment by a firm through one partner of all its merchandise in trust to pay the expenses of the trust, then to pay a debt due to the trustee, and then to distribute the surplus *pro rata* among its other creditors, is an assignment; but, as it does not show that the assignors are insolvent, it is not a general assignment, under the law of Texas, and need not conform thereto.—*Johnson v. Robinson*, S. C. Tex., May 31, 1887; 4 S. W. Rep. 625.

20. ASSIGNMENT—For Creditors—Statutory.——When an assignment shows an intention to assign in accordance with the Texas laws for the benefit of creditors, and the assignor fails to state that all his property subject to the payment of his debts is included, yet he will be presumed to have intended to convey all such property.—*McIlhenny v. Miller*, S. C. Tex., May 27, 1887; 4 S. W. Rep. 614.

21. ATTACHMENT—Action for Damages—Discharge of Attachment.——Circumstances stated under which an action for wrongful attachment is maintainable. One who sues out an attachment wrongfully is liable in damages, although the attachment is afterwards released. He is liable to the attachment defendant for the value of the property if it is lost to him.—*Farrar v. Tulley*, S. C. Tex., May 27, 1887; 4 S. W. Rep. 558.

22. ATTACHMENT—Judgment—Repeal.——The requirement in the attachment act that the report of the auditor must be on file for ten days, and approved by the judge before the order for judgment, is not repealed by the act of 1886.—*Plum v. Lugar*, S. C. N. J., June 22, 1887; 9 Atl. Rep. 779.

23. ATTACHMENT—Plea in Abatement—Res Adjudicata.——Matters put in issue on the trial of a plea in abatement in an attachment suit are not *res adjudicata*, where the case is afterwards tried on its merits.—*Garrett v. Greenwell*, S. C. Mo., May 16, 1887; 4 S. W. Rep. 441.

24. BOUNDARY—Survey.——Where there are conflicting calls in two patents indicating different lines, that actually run by the surveyor will prevail if it can be proved. And a call for the marked line of an older survey will prevail over a call for distance.—*Duff v. Moore*, S. C. Tex., May 13, 1887; 4 S. W. Rep. 530.

25. Carriers — Limitation of Liability.—Under Texas laws, a provision in a contract by a common carrier that suit for any damages suffered must be brought within a certain time, will be sustained if reasonable, but any attempt to limit its liability, or any requirement to give notice at a certain time and place before bringing suit, is void.—*Gulf, etc. R. Co. v. Trawick*, S. C. Tex., May 20, 1887; 4 S. W. Rep. 567.

26. Compromise — Settlement — Mistake.——If two persons having claims against each other, and being on an equal footing, make a compromise and settlement, it will not be disturbed because one party made a mistake in calculating his account.—*Brooks v. Hall*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 236.

27. Conflict of Laws—Injuries—Death.——A statute giving a right of action for injuries producing death, will not be enforced in another State where the common law still prevails.—*Texas, etc. R. Co. v. Richards*, S. C. Tex., May 30, 1887; 4 S. W. Rep. 627.

28. Constitutional Law—Criminal Practice—Venue. ——A statute of Missouri which authorizes the trial of a person accused of crime in a county other than that in which it was committed, or if the county is uncertain, in either of the two or more counties in one of which it was certainly committed, is unconstitutional. —*State v. Hatch*, S. C. Mo., May 16, 1887; 4 S. W. Rep. 502.

29. Contract — Compromise—Consideration.——The compromise of a disputed claim, made *bona fide*, is a good consideration for a promise, though it should ultimately appear that the claim is worthless.—*Grandin v. Grandin*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 756.

30. Contract—Damages— Arbitration.—— In a suit on a building contract for extra work done, where the contract provides that such items are to be submitted to arbitration, the plaintiff cannot recover therefor when he has not submitted them to arbitration nor offered so to do.—*Scammon v. Denio*, S. C. Cal., May 31, 1887; 14 Pac. Rep. 98.

31. Contract—Interpretation.—— Where, by agreement, A purchases cotton and ships it to B, who was to report the classification if there was any falling off in grade or quality. B sued A for an alleged balance of account: *Held*, that B was not required to report in a reasonable time, and an instruction that he could not recover unless he did so was error.—*Watson v. Walker*, S. C. Tex., April 19, 1887; 4 S. W. Rep. 576.

32. Contract—Option—Construction.—— An instrument in writing, whereby A agrees to pay B so much money, or guarantee to B the use of his farm during his life, does not authorize a suit for the money, in the absence of proof that A interfered with B's use of the farm.—*Bennett v. Bennett*, S. J. C. Me., March 10, 1887; 9 Atl. Rep. 735.

33. Corporation—Charter—Stock.——Where a statute requires that the charter of a railroad company set forth the time and manner in which "the stock shall be paid for," it is a sufficient compliance for a charter to set forth that the stock be paid for in cash, and that no certificate be issued until such payment is made.—*New Orleans, etc. R. Co. v. Frank*, S. C. La., May 23, 1887; 2 South. Rep. 310.

34. Corporation—Mutual Insurance Companies—Dissolution—Assets.——The assets of a dissolved mutual insurance company, after paying all liabilities, belong to the State.—*Titcomb v. Kennebunk, etc. Co.*, S. J. C. Me., March 14, 1887; 9 Atl. Rep. 732.

35. Courts —Jurisdiction — Statutory Penalties.—— Every suit of a civil nature at law, mentioned in the acts concerning the jurisdiction of district courts and those for the trial of small causes, does not include actions for statutory penalties.—*Koch v. Vanderhoof*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 771.

36. Courts—Powers—Lands Beyond Jurisdiction.—— A Louisiana court, having general equity powers and jurisdiction of the person of a defendant, can decree a conveyance by him of land in another State and enforce the decree by process against him.—*Seixas v. King*, S. C. La., May 9, 1887; 2 South. Rep. 416.

37. Counterclaim—Justices—Appeal.—— On appeal from a justice of the peace, the defendant cannot enlarge his counterclaim.—*Bowdon v. Gillett*, S. C. Tex., April 22, 1887; 4 S. W. Rep. 578.

38. County—Commissioners—Court—Succession.—— The board of county commissioners constitute a court, so one commissioner may act with the others in proceedings to lay out a road, and his successor in office may take his place in completing the proceedings where their acts are separable.—*Chapman v. County Commrs.*, S. J. C. Me., March 8, 1887; 9 Atl. Rep. 728.

39. Criminal Law—Assault— Indictment. —— On an indictment for assault with intent to murder, the defendant may be convicted of aggravated assault.—*Balding v. State*, Tex. Ct. App., March 9, 1887; 4 S. W. Rep.

40. Criminal Law—Burglary —Instruction. —— In a trial for burglary and larceny, a defense by one defendant was that his co-defendant, in his presence, claimed to have purchased alleged stolen property, when it was found in the co-defendant's possession: *Held*, that the court should have instructed on the effect of such evidence.—*Shuler v. State*, Tex. Ct. App., March 9, 1887; 2 S. W. Rep. 581.

41. Criminal Law—Continuance—Absent Witness.—— The wrongful refusal of a continuance on account of an absent witness is the ground for a new trial, but it should not be granted when part of his expected evidence is proved by another witness and the rest of it is immaterial.—*Brown v. State*, Tex. Ct. App., March 16, 1887; 4 S. W. Rep. 588.

42. Criminal Law—Evidence—Answer.——A defendant cannot exclude from evidence an answer prejudicial to him if he elicited it from the witness.—*May v. State*, Tex. Ct. App., Feb. 16, 1887; 4 S. W. Rep. 591.

43. Criminal Law— Evidence — Instructions. —— In Texas, the charge of the court must respond to every issue raised by the evidence.—*Bond v. State*, Tex. Ct. App., March 9, 1887; 4 S. W. Rep. 580.

44. Criminal Law—Forgery— Illegal Instrument.—— An instrument which shows on its face that it was intended to circulate as money, though its issue is prohibited under heavy civil and criminal penalties, is not void, and may be the subject of forgery.—*Nelson v. State*, S. C. Ala., June 14, 1887; 2 South. Rep. 463.

45. Criminal Law—Indictment.——Under §§ 1049-52 and others, Rev. Stat. La., an indictment is sufficient if it charges the offense in the words of the statute.—*State v. Tisdale*, S. C. La., April 25, 1887; 2 South. Rep. 406.

46. Criminal Law—Indictment—Allegation of Time.— An indictment is fatally defective unless it allege the exact day, as well as the month and year, when the offense was committed.—*State v. Beaton*, S. J. C. Me., March 14, 1887; 9 Atl. Rep. 728.

47. Criminal Law — Indictment — Duplicity — Repugnancy.——An indictment for signing a false certificate of stock with intent that it should be used, and an allegation in the same count that it was issued and used, is bad for duplicity. An allegation that defendant caused to be issued to B a false certificate of the ownership of certain stock, signed in blank, and of the following tenor, is bad for repugnancy.—*State v. Havers*, S. C. Vt., June 23, 1887; 9 Atl. Rep. 841.

48. Criminal Law—Indictment—Victuating House. — In an indictment for keeping an unlicensed victuating house, which follows the language of the statute, it is not necessary to allege that defendant did open and keep open such house for business, nor that he was the keeper.—*State v. Kane*, S. C. R. I., May 27, 1887; 9 Atl. Rep. 848.

49. Criminal Law—Instructions—Jury.——The jury, in a felony case, should always be instructed that they are the exclusive judges of the facts and of the weight to be given to the evidence.—*Barbee v. State*, Tex. Ct. App., March 12, 1887; 4 S. W. Rep. 584.

50. Criminal Law—Joint Act—Liability.——Positive proof is not necessary to show a previously formed common purpose, where two persons are on trial for

murder, and it is shown that one cut deceased with a knife as he advanced on the other, who then fired the fatal shot; each is equally guilty.—*Jordan v. State*, S. C. Ala., June 13, 1887; 2 South. Rep. 460.

51. CRIMINAL LAW — Juror — Disqualification — New Trial.——When a juror on the *voir dire* shows he is qualified to sit as such in a criminal case, but it is afterwards shown that he is not qualified, the defendant is entitled to a new trial.—*Boren v. State*, Tex. Ct. App., Feb. 2, 1887; 4 S. W. Rep. 463.

52. CRIMINAL LAW—Jury—Mistake in Names.——It is not a sufficient ground for quashing the *venire*, that there were mistakes in the names of persons summoned as jurors in a capital case, and that the same name was repeated.—*McKee v. State*, S. C. Ala., May 24, 1887; 2 South. Rep. 451.

53. CRIMINAL LAW—Justice of the Peace—Warrant.—A justice of the peace has no right, out of his own township, to entertain a criminal complaint, nor to issue a warrant for the arrest of the accused.—*Atchison, etc. R. Co. v. Rice*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 220.

54. CRIMINAL LAW—Murder —Relations — Criminating Conduct.——Upon a trial for murder by poison by defendant of his wife, evidence of the relations of the two toward each other, up to the time of the taking of the poison, is admissible. The fabrication of false stories to divert suspicion from the defendant is a circumstance indicatory of guilt.—*McMeen v. Com.*, S. C. Penn., Jan. 3, 1887; 9 Atl. Rep. 878.

55. CRIMINAL LAW—Murder—Self-defense—Retreat.—A charge "that, to make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by him; that he was, or appeared to be, so menaced at the time as to create a reasonable apprehension of danger to his life, or of grevious bodily harm, and that there was no other reasonable mode of escape," does not antagonize the principle that a man is not bound to retreat from his own domicile.—*Watson v. State*, S. C. Ala., May 25, 1887; 2 South. Rep. 455.

56. CRIMINAL LAW—Murder—Verdict — Evidence.——When, in a murder case, the evidence is conflicting, a verdict of murder in the first degree will not be disturbed, when some of the evidence calls for such a verdict.—*People v. Brady*, S. C. Cal., June 9, 1887; 14 Pac. Rep. 202.

57. CRIMINAL LAW—Ordinances—General and Special Laws.——On the summary arrest of a party, under the general law, jurisdiction is not acquired to prosecute him, acording to the requirements of the charter of the city of Newark.—*Pell v. City of Newark*, S. C. N. J., June 15, 1887; 9 Atl. Rep. 778.

58. CRIMINAL LAW—Other Crime—Instructions.——In a case of larceny of a horse, when proof of the larceny of other animals at the same time and in the same neighborhood has been admitted, it is error for the court not to instruct the jury that such evidence is only admissible to prove the intent with which the animal alleged was taken.—*Davis v. State*, Tex. Ct. App., March 16, 1887; 4 S. W. Rep. 590.

59. CRIMINAL LAW—Practice — Self-defense — Instruction.——Where, in a trial on an indictment for assault and assault to murder, self-defense is set up, and there is some evidence of it, the accused is entitled to a separate and distinct charge on the law of self-defense as applied to the facts shown, and the error in refusing such charge is not cured by a charge coupling proposition as to threats with one as to self-defense.—*Gerdine v. State*, S. C. Miss., May 16, 1887; 2 South. Rep. 313.

60. CRIMINAL LAW — Presentment — Indictment — Appeal. ——An objection to the sufficiency of the presentment of an indictment comes too late when first made on appeal.—*Rowlett v. State*, Tex. Ct. App., March 12, 1887; 4 S. W. Rep. 582.

61. CRIMINAL LAW—Process for Witnesses—Constitutional Law.——So far as the act of the eighteenth legislature deprives a prisoner of the right to an attachment for an absent witness, it is contrary to the constitution of Texas, and void.—*Homan v. State*, Tex. Ct. App March 12, 1887; 4 S. W. Rep. 575.

62. CRIMINAL LAW — Rape — Assault. ——An assault with intent to commit rape can only be established by proof of force or attempted force.—*Milton v. State*, Tex Ct. App., March 12, 1887; 4 S. W. Rep. 574.

63. CRIMINAL LAW—Stolen Goods — Accomplice — Instruction.——It is error to allow the jury to convict the defendant of receiving stolen goods on the testimony of the thief, without allowing them to find whether the thief was his accomplice, so as to require corroboration.—*People v. Kraker*, S. C. Cal., June 4, 1887; 14 Pac. Rep 196.

64. CRIMINAL LAW—Verdict—Presence of Accused.—At common law, a verdict can be rendered in criminal cases without the presence of the accused, when the case is not one of life or limb; in New Jersey, such verdicts are irregular only in capital cases.—*Jackson v. State*, S. C. N. J., May 24, 1887; 9 Atl. Rep. 740.

65. CRIMINAL PRACTICE—Charge—Bill of Exceptions. ——Where an oral charge was delivered by the trial judge, and of which the accused complains, the statement of said judge in the bill of exceptions must be the guide in determining the purport of the charge.—*State v. Broussard*, S. C. La., May 23, 1887; 2 South. Rep. 422.

66. CRIMINAL PRACTICE—Larceny—Evidence of Ownership.——An instruction that was unnecessary to bring the party named in the information as the owner of the property stolen, to testify to that fact, when the ownership is established by other proof to the satisfaction of the jury, and that if ownership is not thus proved the jury should acquit the accused, is legal and proper.—*State v. Primeaux*, S. C. La., May 23, 1887; 2 South. Rep. 423.

67. CUSTOMS DUTIES—Shells.——Shells partially prepared for use or for ornament are exempt from duty, and are not "manufactures of shells."—*Hartraunf v. Wiegeman*, U. S. S. C., May 2, 1887; 7 S. C. Rep. 1240.

68. DEED—Boundary—Prior Conveyance.—Where one accepts a deed bounding his land by that of another, the land referred to controls his distances, and he cannot claim any portion of that land, though the deed for the latter was from the same grantor, and was not legally, though actually, recorded.—*Bryant v. Maine, etc. R. Co.*, S. J. C. Me., March 14, 1887; 9 Atl. Rep. 736.

69. DEEDS—Delivery—Record.——Though a grantor records a deed and in subsequent conveyance recognizes the land as belonging to the grantee, if he remains in possession of the deed till his death, no consideration having been paid, and the deed having been made to avoid the payment of fines, there is no delivery.—*McGrau v. McGrau*, S. J. C. Me., March 7, 1887; 9 Atl. Rep. 846.

70. DEEDS —Description of Land—Limitations.——A conveyance of 320 acres of land to be taken in rectangular shape out of any of the four corners of a large tract, as the vendee may select, conveys only an equity, and a failure to select for twenty years bars the right to do so.—*Dull v. Blum*, S. C. Tex., May 17, 1887; 4 S. W. Rep. 489.

71. DEEDS — Execution — Impeaching. ——A deed properly certified to by a competent officer cannot be overthrown by the unsupported testimony of the grantor that he never executed nor acknowledged it.—*Chivington v. Colorado Springs Co.*, S. C. Colo., Feb. 18, 1887; 14 Pac. Rep. 212.

72. DIVORCE—Adultery.——It is not sufficient to support an action by a wife for a divorce, that her husband, when charged by her with adultery, did not deny it, and told her to go on with her threatened divorce suit, that he would not oppose it.—*Koenig v. Koenig*, N. J. Ct. Ch., May 28, 1887; 9 Atl. Rep. 750.

73. DIVORCE — Unchastity —Cross-bill—Estoppel—Decree.——A wife may file a bill for divorce, because her husband in a prior suit by her for divorce filed a cross-bill accusing her of being pregnant by some other man at the time of their marriage, though the original bill

and cross-bill were dismissed. Such a charge tended to cause her grievous mental suffering. In granting her a decree the court may order a judgment wrongfully entered against her for her husband to be assigned to her.—*Haley v. Haley*, S. C. Cal., May 28, 1887; 14 Pac. Rep. 92.

74. EASEMENTS — Drains — Municipal Corporations—Prescriptive Rights — Injunction. —— Where a city, which has maintained for a long period a drain through the land of two adjoining owners, changes its course so as to avoid both parties, the owner of the higher land, if he has acquired a prescriptive right to use it by openings therein, can continue to use it only to the extent that no additional burden is imposed on the other land, and may have an injunction to restrain any interference with that right.—*Masonic, T. A. v. Harris*, S. J. C. Me., March 7, 1887; 9 Atl. Rep. 737.

75. EMINENT DOMAIN—Highway—Railroad.——A public road cannot, since the act of 1881, be laid out across a railroad within 500 feet of an existing highway. When such a proposed road intersects the track and station grounds of a railroad at right angles, the railroad is entitled to damages.—*State v. Capner*, S. C. N. J., June 22, 1887; 9 Atl. Rep. 781.

76. EMINENT DOMAIN—Telegraph Companies—Assessment.——Before a telegraph company can apply to have the damages assessed for the construction of its line through the streets of a city, it must apply to the legislative body to designate its route through the city. Its petition to assess damages must indicate the size of the poles to be erected and their situations.—*Broome v. N. Y. & N. J. Telephone Co.*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 754.

77. EQUITY—Cloud on Title—Possession.——A suit to remove a cloud on the title may be brought, whether the plaintiff is out of or in possession.—*Walet v. Haskins*, S. C. Tex., June 3, 1887; 4 S. W. Rep. 596.

78. EQUITY—Evidence—Practice — Witness.——In an equity cause, where plaintiff takes the depositions of defendants, and afterwards a jury trial is ordered and defendants testify in their own behalf, plaintiff cannot read the depositions except for the purpose of contradicting them.—*Pearce v. Pettit*, S. C. Tenn., May 5, 1887; 4 S. W. Rep. 526.

79. EVIDENCE—Expert—Intelligence.——When an expert shows, upon his examination, that he possesses little general intelligence, it is discretionary with the court to allow him to give his opinion, though he has some experience in the matter examined into.—*Broquet v. Tripp*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 227.

80. EXECUTION—Equitable Title—Deed of Confirmation.—Where the owners of land sell and give a title bond for deed when purchase money shall be paid, and it is afterwards paid but no deed is made, and they afterwards make a deed of confirmation to one who had purchased at sheriff's sale under execution the interest of such original vendee, that deed passes the title to such purchaser as against a purchaser from the administrator of the original vendee, who bought with notice, actual and constructive, of the previous deed of confirmation by the original vendors, to the purchaser at execution sale.—*Atchison v. Henry*, S. C. Mo., March 21, 1887; 4 S. W. Rep. 497.

81. EXECUTION—Exemption—Injunction.——A bill in equity will not lie to restrain a sale under execution, when the debtor had not time to claim his exemptions. The remedy is sufficient at law.—*Driggs & Co.'s Bank v. Norwood*, S. C. Ark., May 7, 1887; 4 S. W. Rep. 448. [redacted]

82. EXECUTION—Interest of Mortgagee.——The interest of a mortgagee, although a legal title, is not subject to attachment or sale under execution, at least before an entry for condition broken, with a view to foreclosure.—*Morris v. Baker*, S. C. Ala., June 1, 1887; 2 South. Rep. 335.

83. EXECUTION — Levy — Leasehold.—— A leasehold estate with a right to mine coal is a chattel real, and a levy thereon on an execution against the owner thereof does not subject the officer to liability to a third party claiming title thereto.—*Maurer v. Sheafer*, S. C. Penn., May 9, 1887; 9 Atl. Rep. 869.

84. EXECUTORS — Accounting — Liability.——Where, under the facts it is impossible that an administrator can have paid a claim, for payment of which he has been allowed credit in his final settlement, he and his surety are liable to the claimant for the amount thereof with interest.—*Williamson v. Whittington*, S. C. Ark., May 7, 1887; 4 S. W. Rep. 449.

85. EXECUTORS—Sale of Land—Record—Inadequacy of Price.——The record of a sale of land by an administrator need not show that the court took evidence as to the adequacy of the price for which the land was sold. To set aside the sale for inadequacy of price a direct proceeding must be instituted.—*Capt v. Stubbs*, S. C. Tex., May 6, 1887; 4 S. W. Rep. 467.

86. EXECUTORS—Security — Appeal.——Under Pennsylvania law the court, in its discretion, may require an executor to give security, and the supreme court will only interfere when there has been a clear abuse of such discretion.—*Sharp's Appeal*, S. C. Penn., May 30, 1887; 9 Atl. Rep. 860.

87. FORCIBLE ENTRY AND DETAINER—Amendment.—— The complaint in a forcible entry and detainer action cannot be amended so as to materially charge an allegation material to be charged and proved.—*Waters v. Haynes*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 770.

88. FORGERY—Promissory Note — Instructions — Evidence—Appeal.——Where the defense is that the note sued upon is a forgery, and there is evidence tending to support the verdict, it will not be disturbed. The court may, by a proper instruction, withdraw from the jury evidence erroneously admitted. An appellate court will not take notice of exceptions to evidence, unless it appears by the record that the party excepted *at the time*, and the admission of the evidence is assigned in the party's motion for a new trial as one of the grounds on which his motion was based.—*Griffith v. Hanks*, S. C. Mo., Feb. 28, 1887; 4 S. W. Rep. 508.

89. FRAUDS—Statute of — Collateral Promise. —— A personal judgment cannot be rendered against the owner of a house for materials furnished therefor on the credit of the contractor, though the owner subsequently promised to see them paid for.—*Farnham v. Davis*, S. J. C. Me., March 10, 1887; 9 Atl. Rep. 725.

90. FRAUDS—Statute of—Infancy—Jurisdiction.——A parol agreement by an attorney to clear the title of a tract of land for one-half of the land, is within the statute of frauds, and cannot be enforced, though the attorney may recover compensation for his services and expenditures. Infants, when parties to a suit, must be served with process; otherwise the court has no jurisdiction and cannot appoint a guardian *ad litem*.—*Sprague v. Haines*, S. C. Tex., May 5, 1887; 4 S. W. Rep. 371.

91. FRAUDS—Statute of—Memorandum.——Where the lessee on a parol lease of land for a year from a future day gives a promissory note, such note with letters referring to it is a sufficient memorandum in writing, within the statute of frauds, as against the lessee.—*Alabama, etc. Ins. Co. v. Oliver*, S. C. Ala., May 26, 1887; 2 South Rep. 445.

92. FRAUDULENT CONVEYANCE —Debt — Surplus. —— When a creditor, with a knowledge of his debtor's insolvency, takes a conveyance of his debtor's stock in trade in satisfaction of his debt, and pays money in addition, the transaction is fraudulent as to other creditors if the stock is worth more than the debt and the object was to protect the residue from attachment.—*Oppenheimer v. Half*, S. C. Tex., June 3, 1887; 4 S. W. Rep. 562.

93. FRAUDULENT CONVEYANCE —Infancy — Defenses.—A fraudulent conveyance will only be set aside at the instance of a creditor who had a return of *nulla bona* on his execution, or an attachment on the property so conveyed. When an infant is before a court of equity, it is the duty of the chancellor to see that he has the benefit of every defense that could have been made or

pleaded for him.—*Turner v. Short*, Ky. Ct. App., May 24, 1887; 4 S. W. Rep. 347.

94. FRAUDULENT CONVEYANCE — Marriage.——A deed of land by a man to a woman in consideration of marriage cannot be avoided for fraud by the husband's creditors, unless the wife had knowledge of the fraud.—*Gibson v. Bennett*, S. J. C. Me., March 10, 1887; 9 Atl. Rep. 727.

95. GARNISHMENT — Costs. —— When a garnishee is discharged upon his answer, his costs and expenses, including a proper attorney's fee, are taxed against the plaintiff in the action.—*Johnson v. Blanks*, S. C. Tex., June 7, 1887; 4 S. W. Rep. 557.

96. GARNISHMENT — Process — Acceptance. —— A trustee cannot be charged in garnishment by his acceptance of service of the writ without the defendant's consent.—*Nelson v. Sanborn*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 721.

97. GIFT—Bank Deposit—Income.——A deposit by A of money in a bank in B's name, with the right by A to take the income during his life, to which B assents, is a valid gift, if intended as a present gift, though A keep the bank book.—*Smith v. Ossipee Bank*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 792.

98. GRAND JURY — Impaneling. —— In Alabama, a grand jury is not legally organized when the record, expressly or by clear implication, shows that the foreman was not sworn.—*Roe v. State*, S. C. Ala., June 12, 1887; 2 South. Rep. 459.

99. GUARDIAN — Accounting — Attorney's Fees. —— Where an attorney has been employed by a guardian to sue for real estate claimed to belong to the ward, the orphans' court has jurisdiction to hear and determine a disputed claim for such fees when auditing and settling the guardian's accounts.—*Appeal of Price*, S. C. Penn., May 23, 1887; 9 Atl. Rep. 856.

100. GUARDIAN AND WARD— Sale of Land—Innocent Purchaser.——A guardian should not file a bill in his own name as guardian to sell his ward's land, but such irregularity will not defeat the jurisdiction of the court. A purchaser in good faith under a decree of sale, made under the act relative to selling a ward's lands, will not be affected by a reversal of the decree for irregularities, if the court had acquired jurisdiction. — *Newbold v. Schlens*, Md. Ct. App., March 15. 1887; 9 Atl. Rep. 849.

101. HABEAS CORPUS —Trial — Irregularities. —— On *habeas corpus* the court will not consider whether the prisoner was entitled to a jury at his trial, the court having undoubted jurisdiction of his case.— *Ex parte Brandon*, S. C. Ark., May 14, 1887; 4 S. W. Rep. 452.

102. HIGHWAYS — Widening — Discontinuance. —— Where a town way is widened by a new county location, but the fences remained on the line of the old road for thirty-seven years, the law that a way laid out shall be considered as discontinued unless opened within six years, does not apply, nor the law that a fence which has continued for forty years in the same place on a road shall conclusively indicate the line of the road.—*Heald v. Moore*, S. S. C. Me., March 8, 1887; 9 Atl. Rep. 734.

103. HOMESTEAD—Abandonment.——Where husband and wife, owning a homestead, moved out of the State and remained absent seven years without apparent intention of returning, such removal and absence is an abandonment of the homestead.—*Reece v. Renfro*, S. C. Tex., April 27, 1887; 4 S. W. Rep. 545.

104. HOMESTEAD—Absence—Abandonment. —— The removal of a married woman, who has a homestead, from the State, her absence for several years, the death of her husband and her re-marriage, constitute an abandonment of the homestead.—*McElroy v. Magoffin*, S. C. Tex., April 29, 1887; 4 S. W. Rep. 547.

105. HOMESTEAD—Approval of Allotment.——Where the court has ordered an allotment to be received and recorded, *held*, in the absence of exceptions, that the action of the court is equivalent to approval of the report without further ruling.—*Dossey v. Pitman*, S. C. Ala., Feb. 24, 1887; 2 South. Rep. 443.

106. HOMESTEAD—Exemption—Ditch—Filing Declaration.——Plaintiff gave a right of way over his homestead for a ditch and paid one-fourth of the expense on an agreement that he was to have one fourth of the water to irrigate his homestead, and to own one-fourth of the ditch, the other party using the rest of the water on his own land: *Held*, that plaintiff's interest in the ditch and water is part of his homestead, and is exempt from sale as far as a homestead is. A party can file a declaration of homestead after findings against him, but before judgment is entered.—*Fitzell v. Leaky*, S. C. Cal., June 7, 1887; 14 Pac. Rep. 198.

107. HUSBAND AND WIFE—Community Property—Purchaser—Notice.——In Texas, community property belong equally to each, no matter in whose name the title may be, but if it is in the husband's name, a purchaser from him or from his devisee, without notice of the wife's interest and for value, is entitled to the land as against her or her heirs.—*Edwards v. Brown*, S. C. Tex. May 6, 1887; 4 S. W. Rep. 380.

108. HUSBAND AND WIFE—Conveyances—Creditors.—— A husband may convey his real estate to his wife for a *bona fide* indebtedness. though he is in failing circum stances, and thereby his creditors get nothing.—*Chapman v. Summarfield*, S. C. Kan., June 11. 1887; 14 Pac. Rep. 235.

109. HUSBAND AND WIFE—Resulting Trust—Execution. ——A resulting trust in land in favor of the wife will prevail over the rights of a creditor of the husband, who levies on it under an execution against the husband, who has the apparent title, and also against a purchaser with notice at the execution sale.—*Yoe v. Montgomery*, S. C. Tex., May 27, 1887; 4 S. W. Rep. 622.

110. HUSBAND AND WIFE — Separate Estate—Community Property.——A conveyance by deed of relinquishment, not acknowledged by the grantor, a married woman, nor signed by her husband, of her separate estate in the community property left by her mother, is not valid, under Texas laws, and she must return the consideration received.—*Stephens v. Shaw*, S. C. Tex., May 10, 1887; 4 S. W. Rep. 458.

111. INFANT—Support—Child's Estate—Parent. —— It is a father's duty, if he can, to maintain and educate his child according to her condition and expectations during her minority, though she have an estate; but if his means are insufficient, chancery will make an allowance out of her estate for her entire support, or to supplement the father's contribution thereto, according to circumstances.—*Fuller v. Fuller*, S. C. Fla., May 6, 1887; 2 South. Rep. 426.

112. INJUNCTION—Water Company.——Where a consumer has offered to pay in advance the lawful amount for use of water during the year, an injunction will lie to prevent the water company from shutting off his supply.—*Ernest v. N. O. Water-works Co.*, S. C. La., May 9, 1887; 2 South. Rep. 415.

113. INSOLVENCY—Discharge—Evidence.——When, in a suit, the defendant pleads a discharge under the insolvent act, the sole question for the jury is whether the defendant has concealed any part of his property or knowingly given a false schedule, or committed any fraud under the provisions of the act of 1852 and its amendment.—*Dean v. Grimes*, S. C. Cal., June 3, 1887; 14 Pac. Rep. 178.

114. INSURANCE—Benefit Society—Certificate—Assignment.——Insurance policies are not generally assignable, but the certificate of a mutual benefit society may be assigned, if its charter and by-laws authorize it; and one who had exchanged such a certificate for a tract of land, may hold his assignee to the bargain.—*Jackson v. Anderson*, Ky. Ct. App., May 12, 1887; 4 S. W. Rep. 326.

115. INSURANCE — Delay — Agent —Forfeiture.——An insurance company cannot claim a forfeiture for failure to furnish proofs of death when it has furnished blanks to its agent who delayed to transmit them to the claimant, and afterwards delayed to transmit them to the company.—*Travelers', etc. Co. v. Edwards*, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1249.

116. INSURANCE — Warranty — Freight. ——Where a policy prohibits the assured from insuring his interest beyond a stipulated sum, he may nevertheless insure the amount of freight to be earned by the ship during the voyage in question.—*Merchants', etc. Co. v. Allen*, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1248.

117. INSURANCE—Life—Assignment — Insurable Interest.——An assignment of a life insurance policy by the assured to his cousin, who lives with him as a member of his family, and is dependent upon him for employment and support, is void, though the assignee agrees to pay the assessments, and the policy should be paid to the original beneficiaries.—*Price v. Knights of Honor*, S. C. Tex., May 31, 1887; 4 S. W. Rep. 633.

118. INSURANCE—Life —Revival — Representations.—— When an application for the revival of a lapsed life insurance policy contains statements as to the insured, which are warranted to be true or the policy to be void, upon revival of the policy such statements are incorporated into the policy as warranties.—*Metropolitan, etc. Co. v. McTague*, S. C. N. J., June 15, 1887; 9 Atl. Rep. 766.

119. INTOXICATING LIQUORS—Express Company—Delivery—Knowledge.——An express company is not bound to transport or deliver intoxicating liquor if it thereby incurs a penalty, but in the absence of suspicious circumstances is not bound to know nor authorized to find out the contents of packages offered to it for transportation.—*State v. Goso*, S. C. Vt., June 21, 1887; 9 Atl. Rep. 829.

120. JUDGMENT—Default—Motion—Costs.— —A judgment by default cannot be rendered while a motion to quash the sheriff's return to the summons remains undetermined. Costs being adjudged on the overruling of a demurrer is according to law, which is constitutional, and the court will not consider the reasonableness of the law.—*Chivington v. Colorado Springs Co.*, S. C. Colo., Feb. 18, 1887; 14 Pac. Rep. 212.

121. JUDGMENT—Default—Setting Aside—Record.—— Unless a default has been committed by the gross negligence of the party or his attorney, he should be permitted to answer upon terms as to costs, and the default should be set aside. The affidavit of the clerk of the trial court cannot be used in an appellate court to correct errors in the transcript of the record. He should send up a corrected transcript.—*Haggerty v. Walker*, S. C. Neb., June 8, 1887; 33 N. W. Rep. 244.

122. JUDGMENT—Demurrer—Res Adjudicata.——When a petition has been twice held bad and two trial amendments filed, and a third petition is filed, which is adjudged insufficient, it is to be presumed that the judge concluded that the facts did not show a meritorious cause of action, and such dismissal, not set aside, is *res adjudicata*.—*Bomar v. Parker*, S. C. Tex., June 7, 1887; 4 S. W. Rep. 599.

123. JUDGMENT—Justice—Kansas City Charter—Special Tax Bills—Collateral Attack.——Construction of the charter of Kansas City with reference to special tax bills, and the rendition of judgments on them by justices of the peace upon them, judgments of justices which are not subject to collateral attack.—*Karnes v. Alexander*, S. C. Mo., June 6, 1887; 4 S. W Rep. 518.

124. JUDGMENT — Lien — Recording.——If a statute provides that a judgment duly recorded bears a lien from the date of such recording, but if the record does not state the names of the parties correctly, there is no lien.—*Anthony v. Taylor*, S. C. Tex., May 13, 1887; 4 S. W. Rep. 531.

125. JUDGMENT—Opening — Case Necessary.——The application to open a judgment must make out a case justifying a chancellor in so doing, and the Pennsylvania act relative to the opening of a judgment entered on a warrant of attorney makes no alteration in this respect.—*Knarr v. Elgren*, S. C. Penn.. June 1, 1887; 9 Atl. Rep. 875.

126. JUDGMENT — Proof of Publication—Amendment. ——Proof of publication may be amended after judgment, to show that the notice was actually published the necessary time.—*Hackett v. Lathrop*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 220.

127. JUDGMENT — Record — Presumption.——When a transcript from the county court shows its date of entry, it will be presumed, in the absence of evidence to the contrary, that it was rendered at a regular term.—*Baldridge v. Penland*, S. C. Tex., June 7, 1887; 4 S. W. Rep. 565.

128. JUDGMENT — Revival.——The ten years within which a suit to revive a judgment must be brought, begin to run from the time of the signature to the judgment by the lower judge, or its finality on appeal, whether when the last day for asking a rehearing has expired, or such rehearing is refused.—*Scott v. Seelye*, S. C. La., May 23, 1887; 2 South. Rep. 309.

129. JUROR — Negligence — Contributory Negligence—Instructions.——The competency of a juror who expounds to the court his views on damage suits generally, and his prepossessions against them is a question for the court to try, and its rulings thereon will not be disturbed. How far a boy of eight or nine years of age is liable for contributory negligence considered. All instructions must be read and considered together.—*McCarthy v. Cass Avenue, etc. Co.*, S. C. Mo., June 6, 1887; 4 S. W. Rep. 516.

130. LANDLORD AND TENANT—Covenants — Assignees—Election of Remedies.——A covenant to surrender at the expiration of the term runs with the land and binds the assignees, though they are not mentioned, and though they hold unequal interests, yet they are jointly and severally liable for the damages sustained by not surrendering, and the landlord can sue them for breach of covenant, though he has sustained ejectment against them, provided he withdrew in that suit all claim for damages.—*Cobam v. Goodall*, S. C. Cal., June 10, 1887; 14 Pac. Rep. 190.

131. LANDLORD AND TENANT—Holding Over—Notice to Quit.——If a lease for a certain term give the lessee the option to "continue to occupy by the month" after the expiration of the term, such occupation after the term will create a tenancy from month to month.—*McDevitt v. Lambert*, S. C. Ala., Feb. 1, 1887; 2 South. Rep. 438.

132. LANDLORD AND TENANT—Lease — Acceptance of Surrender.——Merely picking up the key of the house from the door step of his own house, where the tenant had thrown it, by the landlord and keeping it, does not show an acceptance of a surrender of the lease, and the landlord can sue for his rent till the end of the term.—*Dichl v. Lee*, S. C. Penn., May 30, 1887; 9 Atl. Rep. 865.

133. LANDLORD AND TENANT—Lien on Crop.——The landlord may enforce his lien on the crops grown on rented land, against such crop or its proceeds in the hands of any purchaser, unless the right and title of a *bona fide* purchaser for value have intervened.—*Barnett v. Warren*, S. C. Ala., May 27, 1887; 2 South. Rep. 457.

134. LANDLORD AND TENANT—Notice to Quit—Ejectment.——A tenant who enters into possession as such, and afterwards denies his landlord's title, is not entitled to notice to quit. In ejectment only the title to the lands mentioned in the pleadings can be inquired into, the title to other land cannot be given in evidence.—*Ramsey v. Henderson*, S. C. Mo., May 16, 1887; 4 S. W. Rep. 408.

135. LANDLORD AND TENANT—Rent and Advances.—— *Held*, that under § 3469, Alabama code, an affidavit to support an attachment for the balance due for rent and advances by a tenant, is sufficient if it shows that the relation of landlord and tenant existed, that the advances were made for statutory purposes during the continuance of the relation.—*Reese v. Rugeley*, S. C. Ala., May 3, 1887; 2 South. Rep. 441.

136. LIEN—Attorney's Lien—Notice—Appeal.——Under the law of Indiana, an attorney is entitled to a lien on a judgment in favor of his client, but he must file a notice as prescribed by the statute, and this is necessary, although an appeal to the supreme court be taken.—

Alderman v. Nelson, S. C. Ind., June 16, 1887; 12 N. E. Rep. 394.

137. LIENS — Livery Stable Keeper. ——When one allowed to have possession of a horse takes it to a place to which he is forbidden by the owner to take it, and boards it there, the livery stable keeper there has no lien on the horse, under the Texas law.—*Stott v. Scott*, S. C. Tex., May 17, 1887; 4 S. W. Rep. 494.

138. LIMITATIONS—Adverse Possession—Parol Gift.—— Entry on land by permission of the waiver does not constitute adverse possession, but entry under a parol gift of the land, and actual possession with claim of title for fifteen years or more will bar the donor.—*Com. v. Gibson*, Ky. Ct. App., May 28, 1887; 4 S. W. Rep. 453.

139. LIMITATIONS—Amendment of Pleading.——When an amended petition is filed in an action for damages for personal injuries more than a year after the injury, setting forth additional injuries to the plaintiff's body, such additional injuries are not to be considered as a new cause of action in computing the meaning of the statute of limitations.—*Texas, etc. R. Co. v. Davidson*, S. C. Tex., May 31, 1887; 4 S. W. Rep. 636.

140. LIMITATIONS—County Warrants—Order of Court. ——An order of the county commissioners' court that all warrants not registered under a certain act of the legislature shall not be paid, will not bar the holder of a warrant four years thereafter, unless knowledge of the order is brought home to him.—*Leach v. Wilson Co.*, S. C. Tex., May 27, 1887; 4 S. W. Rep. 613.

141. LIMITATION — Disability — Infancy — Statute.—— Under the law of Kentucky, no disability is available to any plaintiff which did not exist when the right of action first accrued. And so if when the right of action first accrued to the ancestor, he was of full age and *sui juris*, the infancy of his heir will not prevent the operation of the statute of limitations.—*Shufflit v. Shufflit*, Ky. Ct. App., May 28, 1887; 4 S. W. Rep. 348.

142. LIMITATIONS—Equity — Injunction.——In proper cases equity will restrain a defendant from setting up the statute of limitations, if, by his action, he has prevented the plaintiff from suing. But this fact must be made clearly to appear. When a vendee has obtained a decree for specific performance, and afterwards sues to recover back the purchase money he has paid, he cannot have an injunction to prevent the vendor from pleading the statute of limitations.—*Lamb v. Martin*, N. J. Ct. Ch., May 31, 1887; 9 Atl. Rep. 711.

143. LIMITATIONS—Mutual Accounts — Application of Payments. ——Items in mutual accounts within six years next before action brought, are not admissions of an unsettled account extending beyond six years, nor do they amount to a promise to pay so as to take the case out of the statute of limitations, nor does a mere understanding that any funds in the hands of either at the end of each year should be applied on the balance of indebtedness, in the absence of an actual application or statement of account or express promise.—*Gage v. Dudley*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 786.

144. LIMITATIONS—Pleading. ——If a party fails to plead the statute of limitations, the court should not relieve him.—*West Hoboken v. Syms*, S. C. N. J., June 22, 1887; 9 Atl. Rep. 780.

145. LIMITATIONS—Statute of—Thirty Years—Adverse Possession—Disability.——Under Rev. Stat. Mo. § 3225, one who neither by himself or those under whom he claims has had actual possession for thirty year of the land which he claims, and has paid no taxes on it, is barred, unless his suit is brought within one year. The statute makes no exception of persons under disability and the court can make none.—*Fairbanks v. Long*, S. C. Mo., May 16, 1887; 4 S. W. Rep. 99.

146. LIMITATIONS—Suspension — Texas Constitution. ——Under the constitution of Texas, the statute of limitations was suspended from January 28, 1861, to December 3, 1869, when the constitution was ratified by the people.—*Peak v. Swindle*, S. C. Tex., May 10, 1887; 4 S. W. Rep. 478.

147. LIMITATIONS—Trust — Disavowal — Notice.—— When notice of the disavowal of a trust is brought home to the beneficiary, the statute of limitations will begin to run from such notice, and after the bar has been formed by adverse possession, no action on such trust can be maintained.—*Ward v. Harvey*, S. C. Ind., June 18, 1887; 12 N. E. Rep. 399.

148. MALICIOUS PROSECUTION. —— Creditors who, pending a proceeding in bankruptcy, elect a syndic, who, under judicial sanction, sells the property mentioned in the *bilan*, cannot be held in damages, though the proceedings are annulled, when the petition does not charge malice and want of probable cause.—*Phillips v. Lehman*, S. C. La., April 25, 1887; 2 South. Rep. 409.

149. MANDAMUS—City Charter — County.——When a *mandamus* will not lie to order a county court to have recorded a survey of a highway made in 1851, within the present city of Elizabeth.—*City of Elizabeth v. Court, etc. of Essex County*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 752.

150. MARRIED WOMAN — Separate Estate of Wife—Charge on.——In Tennessee, it is only necessary in order to charge the separate estate, real or personal, of a married woman with the payment of a debt created by her by contract, oral or written, that she should by express promise or engagement bind the separate estate, provided such charge is within the express or implied powers conferred by the instrument by which such estate is created.—*Ecberly v. McGee*, S. C. Tenn., May 4, 1887; 4 S. W. Rep. 386.

151. MARRIED WOMAN—Wife's Liability on Promissory Note.——Where a married woman held real estate in her own right, and she and her husband used A J K, used in transactions concerning it, the name A J K & Co., the wife's separate estate was held liable for a note given by her husband in that name for goods which were placed in her house.—*Noel v. Kenney*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 351.

152. MASTER AND SERVANT — Dismissal—Drunkenness. ——Drunkenness of an employee may be cause for dismissal, though such drunkenness may not incapacitate him or cause him to fail in the performance of his duties.—*Bass Furnace Co. v. Glasscock*, S. C. Ala., May 23, 1887; 2 South. Rep. 315.

153. MASTER AND SERVANT—Machinery—Rule of Railroad—Contract.——It is the duty of a master to furnish suitable and safe machinery and appliances for the transaction of his business by his servants, and this duty cannot be delegated to another. A rule of a railroad as to the mode of coupling cars, if made known to the brakeman and assented to by him, is part of his contract with the railroad.—*Pennsylvania, etc. Co. v. Whitcomb*, S. C. Ind., June 14, 1887; 12 N. E. Rep. 380.

154. MECHANIC'S LIEN—Apportionment.——A mechanic's lien against a bone-boiling establishment and its various houses, all on one tract of land is good, and need not be apportioned among the several buildings.—*Appeal of Griel*, S. C. Penn., May 30, 1887; 9 Atl. Rep. 861.

155. MORTGAGE—Foreclosure—Personal Decree—Feme Covert.——Where, on an ordinary bill of foreclosure, a decree is rendered against a *feme covert* for the balance of the mortgage debt remaining unpaid after the sale of the mortgaged premises, it is a personal decree, and should be reversed.—*Randall v. Bourquardez*, S. C. Fla., May 5, 1887; 2 South. Rep. 310.

156. MORTGAGE — Marshalling Assets. —— The rule that where one creditor has a lien on two funds and another a lien on one only of them, the first will be forced to exhaust the fund, to which the other has no claim, before sharing with him the other fund, will not be applied when the creditors are numerous and none have exclusive liens upon any of the property, and the rule of marshalling the assets will work injustice upon some of the creditors. The right to marshal assets is a mere equity and not a lien, and depends upon the situation of affairs when the aid of the court is invoked.—*Gillian v. McCormack*, S. C. Tenn., March 10, 1887; 4 S. W. Rep. 521.

157. MORTGAGE—Satisfaction — Series of Notes. ——

Though a mortgagee, upon entering satisfaction of a mortgage on payment of the first note, cannot pursue the mortgaged property any further, yet on default on the second, he may, as provided in the mortgage, declare all the unpaid notes to be due, and may recover a personal judgment against the mortgagor thereon.—*Beal v. Stevens*, S. C. Cal., June 4, 1887; 14 Pac. Rep. 187.

158. MORTGAGE—Sale—Purchaser—Excess of Price.——The purchaser of mortgaged property sold under proceedings to collect one of a series of mortgage notes, may retain the surplus of the price beyond the amount taken under the writ of sale, until demanded by the holders of the remainder of the notes, but he must pay five per cent. interest until paid or deposited according to law.—*Morris v. Exrs. of Cain*, S. C. La., May 31, 1887; 2 South. Rep. 418.

159. MUNICIPAL CORPORATION—Limitation of Indebtedness—Contract.——When a city contracts to pay so much a year, and at the time its debt is at least equal to the limitation imposed upon it, and no provision is made to raise by taxation the money needed, such contract is prohibited.—*State v. Atlantic City*, S. C. N. J., June 15, 1887; 9 Atl. Rep. 759.

160. MUNICIPAL CORPORATION — Ordinances — Appropriations.——An appropriation ordinance of a municipality which specifies the objects of the appropriations as "salary fund," "streets," "fire," "gas," etc., sufficiently complies with the Colorado law, and an officer of such municipality can sue for his salary.—*City of Leadville v. Matthews*, S. C. Colo., May 24, 1887; 14 Pac. Rep. 112.

161. MUNICIPAL CORPORATION — Street Improvements—San Francisco.——The California act of March 23, 1876, providing for the widening of Dupont street in the city of San Francisco and the proceedings taken thereunder are valid.—*Lent v. Tilson*, S. C. Cal., May 31, 1887; 14 Pac. Rep. 71.

162. MUNICIPAL CORPORATION—Taxation.——Land so contiguous to a city that the public welfare requires that it should be under the control of municipal authority, may be subjected to such authority and to consequent taxation, although its owner persists in using it for agricultural purposes. One who pays an illegal tax upon demand and threat of compulsory collection, may recover it back when he discovers his mistake.—*Torbitt v. City of Louisville*, Ky. Ct. App., May 26, 1887; 4 S. W. Rep. 345.

163. MUNICIPAL CORPORATIONS — Ultra Vires—Estoppel.——A municipal corporation is not estopped to deny its liability for acts done by its officers *ultra vires*. Thus, where certain street improvements were required by the charter of a city to be made by abutting proprietors, and the city authorized, if they refused to make them, to cause them to be made by contract, and the city, without calling upon the proprietors to have the work done, let out the contract to one with full notice of all the facts. *Held*, that the act of the city was *ultra vires*, that it was not liable and the contractor could not recover.—*Newberry v. Fox*, S. C. Minn., June 16, 1887; 33 N. W. Rep. 333.

164. NEGLIGENCE—Condition of Premises—Lessor and Lessee.——Where G leased ground from a railroad adjoining its depot, and erected an eating house there and a platform in front thereof, in a suit for injuries sustained from the defects in that platform: *Held*, that the railroad is not liable in the absence of proof that it controls or manages the eating house.—*Texas, etc. R. Co. v. Mangum*, S. C. Tex., May 27, 1887; 4 S. W. Rep. 617.

165. NEGLIGENCE—Trespasser—Infant.——A party is under no duty to a mere trespasser to keep his premises safe, though the latter be an infant.—*Frost v. Eastern R. Co.*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 790.

166. NEGLIGENCE—Turn-pike Company — Contractor.——A turn-pike company is bound to keep its road in safe condition for public travel, and cannot delegate that duty to a contractor, who is excavating its roadbed in order to grade it, and the company is liable for his negligence in this respect.—*Lancaster, etc. Co. v. Rhoads*, S. C. Penn., May 16, 1887; 9 Atl. Rep. 852.

167. NEW TRIAL—Practice.——If an attorney fails to present a statement for a new trial in person or in due time by a messenger, but intrusts it to the mail so that it does not come to hand in time, he cannot get a new trial by an original action for that purpose.—*Proctor v. Wilcox*, S. C. Tex., May 5, 1887; 4 S. W. Rep. 375.

168. NEW TRIAL—Vacating—Order—Appeal.——When an order for a new trial was granted in the presence of plaintiff's attorney, and without objection on his part, plaintiff cannot allege, upon appeal as error in the trial court, that it refused to vacate the order on the ground that it had been made without notice to him.—*Harvey v. Fink*, S. C. Ind., June 16, 1887; 12 N. E. Rep. 396.

169. NUISANCE — Abatement — Special Damages.——When a school district sues to abate a public nuisance, it must show damages sustained by itself differing in kind from those suffered by the public at large.—*School District No. 1 v. Neil*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 253.

170. PARTNERSHIP — Proof of—Estoppel.——Where a man and his wife have dealt with two persons as a partnership, and have executed a note and mortgage to such partnership, they and their representatives are estopped to deny such partnership.—*Wise v. Williams*, S. C. Cal., June 16, 1887; 14 Pac. Rep. 204.

171. PENAL ACTION—Oleomargarine—Procedure—Statute.——Construction of New Jersey oleomargarine statute of March 22, 1886 (P. L. 1886, p. 107). What proceedings are required in penal actions under that statute.——*Heeberg v. Newton*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 751.

172. PLEADING—Bonds—Non-payment of Penalty.——In an action in debt on a penal bond executed to an individual, the declaration must allege the non-payment of the penalty, or the defect will be fatal on general demurrer. Otherwise, in cases of official bonds payable to the State.—*Rigg v. Parsons*, S. C. App. W. Va., April 9, 1887; 2 S. E. Rep. 81.

173. PLEADING—Demurrer Sustained—Rule to Answer—Waiver.——A decree of overruling a demurrer to plaintiff's bill, was the words "and the defendant not asking for further time to answer said bill:" *Held*, these words, construed by the context, and equivalent to "and the defendant not desiring further time," etc., operated as a waiver of a rule upon the defendant to answer said bill.—*Mitchell v. Evans*, S. C. App, W. Va., April 9, 1887; 2 S. E. Rep. 84.

174. POOR DEBTORS—Discharge—Notice.——When a poor debtor applies for his discharge, notice must now be given to his creditors residing in the State, and to the plaintiff's attorney in the suit in which he was imprisoned.—*Louis v. Kaskel*, S. C. N. J., June 15, 1887; 9 Atl. Rep. 773.

175. PRACTICE — Bankruptcy — Discharge—Subsequent Promise.——Plaintiff offered to prove that the defendant promised to pay the debt sued on during the time elapsing between the date of his adjudication as a bankrupt and the date of his discharge. The plaintiff's replication alleged a new promise made since the filing of the bankrupt's petition: *Held*, such evidence was admissible.—*Griel v. Solomon*, S. C. Ala., May 11, 1887; 2 South. Rep. 322.

176. PRACTICE—Conflicting Evidence—Instruction.——In a statutory action for the trial of the right to property in Alabama, it is error to instruct the jury to find for claimant, when the evidence as to the identity of the property conflicts.—*Fait v. Murphy*, S. C. Ala., May 12, 1887; 2 South. Rep. 317.

177. PRACTICE — Damages — Penalty. —— Where an agreement for the dissolution of a partnership contained a provision that the party, any of the other provisions thereto he "shall forfeit to the other as damages $1,000:" *Held*, that there being no fixed rule of estimating the damages for breach of certain provisions, while to others a known standard of damages could be applied, the stipulated sum could not be recovered in

gross for a partial breach, was a penalty, and judgment by default should not therefore be rendered without submitting the case to a jury.—*McPherson v. Robertson*, S. C. Ala., May 31, 1887; 2 South. Rep. 333.

178. PRACTICE — Depositions — Admissibility. —— A rule on an adverse party to show cause why certain depositions should not be read, was made absolute, as shown by the court minutes: *Held*, too late to urge objection to the service of the rule after the action has begun and evidence been offered. Rule should have been taken to correct the minutes so as to conform to facts.—*Baldy v. Brackenridge*, S. C. La., April 25, 1887; 2 South. Rep. 410.

179. PRACTICE —Depositions—Evidence—Objection.—— An objection at the trial to the introduction of evidence contained in a deposition, must state the particular evidence objected to.—*Gano v. Wells*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 251.

180. PRACTICE—Evidence in Rebuttal—Ejectment.—— In an action of ejectment by a female plaintiff, evidence is admitted without objection that she did not sign or acknowledge the deed under which defendant claims title: *Held*, that defendant may rebut, by evidence that she received a part of the consideration for the deed.—*Blair v. Sayre*, S. C. App. W. Va., April 9, 1887; 2 S. E. Rep. 97.

181. PRACTICE—Exception to Charges.——A general exception to several charges given cannot be sustained, unless each one of them is faulty.—*East Tennessee, etc. R. Co. v. Cary*, S. C. Ala., February 24, 1887; 2 South. Rep. 443.

182. PRACTICE —Garnishment — Certiorari.——Where the garnishee, under *fi. fa.*, having confessed his indebtedness, is ordered by the judge to pay over such money into the constable's hands, and where such order is made after three days from service of notice of the seizure on the debtor, who makes no opposition, he cannot, under *certiorari* in this court, have the order annulled on the ground that the money seized was due for wages and exempt.—*State v. Bermudez*, S. C. La., May 9, 1887; 2 South. Rep. 425.

183. PRACTICE — Jury—Oath—Objection.——Objection to the oath administered to the jury should be made at the time of the trial.—*Seymour v. Powell*, S. C. Fla., May 6, 1887; 2 South. Rep. 312.

184. PRACTICE—Motion—Judgment on Postea.——On a motion for a judgment upon a *postea*, the court can only look at the record and the *postea*.—*Clayton v. Levy*, S. C. N. J., June 10, 1887; 9 Atl. Rep. 755.

185. PRACTICE—New Trial—Delay.——The failure to ask for a delay when pressed to trial will not entitle the party to a new trial.—*Couillard v. Seaver*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 724.

186. PRACTICE —Parties — Mortgage Debt. —— Mortgaged land was conveyed, subject to the mortgage by a deed and agreement signed by both parties, stipulating the times and amounts of the deferred payments, which were orally transferred to the mortgagee. *Held*, that the mortgagee, the real party in interest, was the proper plaintiff in an action on such deferred payments. —*Royall v. Prince*, S. C. Ala., May 26, 1887; 2 South. Rep. 319.

187. PRACTICE—Setting Judgment Aside—Defense. —— In a suit to set aside a judgment obtained without notice, and for a new trial, an allegation of ownership of the land in controversy shows a meritorious defense.—*Lowell v. Jones*, S. C. Tex., May 27, 1887; 4 S. W. Rep. 620.

188. PRACTICE—Trial—Verdict.——It is not error for members of a jury to bring in a compromise verdict.—*Owens v. Mo. Pac. R. Co.*, S. C. Tex., April 22, 1887; 4 S. W. Rep. 593.

189. PRINCIPAL AND AGENT—Partnership—Signature—Contract—Burden of Proof.——The rule that where several persons are made agents all must act, does not apply where the agents constitute a partnership. In that case any partner may act, signing the principal's name alone, or by the partnership, or by him individually as agent. An authority to sell land, one-half payable "on or before one year," is fulfilled by a sale one-half payable in one year. If the obligor in a contract to sell land refuses to perform on the ground that the title cannot be made good, the burden is upon him to prove that fact.—*Deakin v. Underwood*, S. C. Minn., June 14, 1887; 33 N. W. Rep. 318.

190. PRINCIPAL AND AGENT—Trustee—Revocation.—— An agent who, in transacting the business of his agency, for considerations of convenience, describes himself as "trustee," is, nevertheless, an agent. If two principals, jointly interested in a matter of business, jointly authorize an agent to act for them, the severance of such joint interest operates a revocation of the agency.—*Howe v. Rand*, S. C. Ind., June 14, 1887; 12 N. E. Rep. 377.

191. PRINCIPAL AND SURETY—Indorser — Extension of Time.——An agreement to extend an overdue promissory note on payment of overdue interest at a greater rate than allowed by law, but in amount of money less than was then due, does not discharge an accommodation indorser.—*Nat. Bk. of Derby Line v. Dow*, S. J. C. Me., March 8, 1887; 9 Atl. Rep. 730.

192. PROMISSORY NOTE—Account—Payment.——If, to an action on a promissory note and an account, and the plea is payment, the proof shows that the note has been paid, but not the account, a verdict for the defendant cannot be sustained.—*Tootle v. Malen*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 264.

193. PROPERTY—Movable — Railroad. ——A railroad built on soil not belonging to the owner of the road, is movable property and liable to the law regulating pledges on movables.—*Woodward v. American Ex. R. Co.*, S. C. La., May 9, 1887; 2 South. Rep. 413.

194. PUBLIC LANDS—Ancient Document — Alteration — Expert.——A Texas bounty certificate shown to be forty-six years old and coming from the proper custody, may be offered in evidence, and the party offering it need not explain the presence of certain words therein, alleged to have been fraudulently inserted. The commissioner of the land office familiar with the records may explain what is the understood official meaning of certain entries therein.—*Shinn v. Hicks*, S. C. Tex., May 13, 1887; 4 S. W. Rep. 486.

195. PUBLIC LANDS—Mining Claims—Minors—Citizenship—Location—Notice.——A minor may locate a mining claim, and his citizenship can be proved by the testimony of his father. The location is not invalid because it was recorded before it was posted.—*Thompson v. Spray*, S. C. Cal., June 14, 1887; 14 Pac. Rep. 182.

196. PUBLIC LANDS—Purchase—Applications.—Where, in a contest for the right to purchase public lands, the contestant, under an order of reference, failed to bring his action, and subsequently filed another application, obtained an order of reference and brought his action: *Held*, that the proceedings were valid.—*Greenwade v. De Camp*, S. C. Cal., June 3, 1887; 14 Pac. Rep. 177.

197. RAILROADS — Consequential Damages — Constitutional Law.——A railroad company operating an elevated railroad upon its own land fronting on a street, is not liable, under the Pennsylvania constitution, for consequential damages to property on the other side of the street.—*Penn. R. Co. v. Lippincott*, S. C. Penn., May 31, 1887; 9 Atl. Rep. 871.

198. RAILROADS — Fences — Statutes.——The law of Minnesota does not require railroads to fence in depot grounds which public interests and convenience require to be kept open. The fence law relating to railroad tracks stated and construed.—*Smith v. Minneapolis, etc. Co.*, S. C. Minn., June 14, 1887; 33 N. W. Rep. 316.

199. RAILROAD — Incorporation — Different States — Franchise—Statute—Practice.——The act of Tennessee of December 4, 1851, merely recognized the previous incorporation by Kentucky of the Louisville & Nashville Railroad Company, and did not incorporate that company. The statute authorized it to exercise its franchises and functions in Tennessee. If a verdict is properly directed for the defendant, a refusal to give instructions at the request of the plaintiff will not be

considered on appeal.—*Goodlett v. Louisville, etc. Co.*, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1254.

200. RAILROAD—Sale—Dissolution—Action for Damages.——When one railroad company sells out to another, a person having a claim for damages for personal injuries against the selling company cannot sue the purchasing company for such damages, nor can he sue the selling company which has been dissolved by the sale. His only remedy is against the stockholders of the latter company.—*Chesapeake, etc. Co. v. Griest*, Ky. Ct. App., May 10, 1887; 4 S. W. Rep. 323.

201. RAPE—Evidence — Statute. ——Construction of the criminal code of Indiana as to what constitutes rape, and what evidence is necessary to sustain such a charge.—*Taylor v. State*, S. C. Ind., June 17, 1887; 12 N. E. Rep. 400.

202. RECEIPTS—Parol Evidence—Explanation.——Parol evidence is admissible to explain the terms made use of in a receipt given for money to be accounted for thereafter, when they are so ambiguous as to require explanation.—*McLane v. Johnson*, S. C. Vt., June 23, 1887; 9 Atl. Rep. 837.

203. RECEIVER—Compensation.——When a receiver of the estate of an insolvent partnership is appointed at the instance of an attaching creditor, who alleged but failed to establish fraudulent conveyances by the partnership, his compensation should be paid out of the fund, as under all the circumstances the appointment of the receiver was proper.—*Jaffray v. Raaz*, S. C. Iowa, June 14, 1887; 33 N. W. Rep. 337.

204. RECEIVER—Insolvent Railroad.——When a railroad has spent all its money, has assumed debts and issued bonds, which debts have not been paid nor the interest on the bonds paid, it is insolvent under the law, and a receiver already appointed will not be discharged till such liabilities are paid, and also the receiver's expenses.—*Sewell v. Cape May, etc. R. Co.*, N. J. Ct. Ch., June 21, 1887; 9 Atl. Rep. 785.

205. REMOVAL OF CAUSES—Practice in State Court.——When, upon an application for the removal of a cause, it appears from the statement of the party objecting that the federal court has jurisdiction, although he states a different residence from that stated by the other side, it is not competent for the State court to order a trial of issue as to which was the real residence of the party.—*Burlington, etc. Co. v. Dunn*, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1262.

206. REMOVAL OF CAUSES—Separable Controversy—Remand.——A suit removed by a defendant, brought in on the ground of a separable controversy between him and plaintiff, is properly remanded when the action is, upon motion of plaintiff, discontinued as to such defendant.—*Texas, etc. Co. v. Sellingson*, U. S. S. C., May 27, 1887; 7 S. C. Rep. 1261.

207. REPLEVIN — Demand—Assignment—Rights upon Rescission.——In an action of replevin to recover goods obtained by fraud, a demand upon the messenger, who had possession awaiting the appointment of an assignee for the insolvent buyer, is admissible to show the rescission of the contract. If the contract is rescinded, the plaintiff is not bound to refund to the buyer the freight he has paid on the goods.—*Chamberlin v. Fuller*, S. C. Vt., June 20, 1887; 9 Atl. Rep. 832.

208. SALE—Conditional Sale—Fraud.——Where a sale of goods is made and the vendee is put in possession, but the vendor, by agreement with the vendee, which is not put upon record, retains the title to the goods and to additions thereafter to be made to them, until the purchase money shall have been paid, such condition is a fraud upon the creditors of the vendee, and void as to them.—*Loving v. Johnson*, S. C. Tex., May 15, 1887; 4 S. W. Rep. 532.

209. SALE—Fraud—Possession — Innocent Purchaser. ——If a party has been induced to part with the title, as well as possession of goods, he cannot recover them from an innocent purchaser; otherwise, if he has only parted with the possession.—*Rohrbough v. Leopold*, S. C. Tex., May 10, 1887; 4 S. W. Rep. 460.

210. SALES—Judicial—Agreement to Buy—Mortgages. ——If, prior to a judicial sale in enforcement of a first mortgage and vendor's privilege ranking all others on the property, the seizing creditor agrees with the debtor to buy it in if not run above the amount of the debt, and then resell to the debtor or anyone by him named, at a certain price and a certain time, such an agreement is lawful, and the title passes to the purchaser, subject to the right of redemption. All other mortgages are extinguished, and will not reattach unless the property is returned to the ownership of the property. —*Davis v. Citizens' Bank*, S. C. La., April 11, 1887; 2 South. Rep. 401.

211 SALE—Mortgage—Parol Evidence. —— A party executing a bill of sale may show that it was only in effect a chattel mortgage, and that he was to retain possession of the goods.—*Butts v. Privett*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 247.

212. SCHOOLS—Authority of Teacher.——A teacher is authorized by law to moderately restrain and correct a pupil, and his authority is not limited to the school room nor while the pupil is under his actual control.—*Balding v. State*, Tex. Ct. App., March 9, 1887; 4 S. W. Rep. 579.

213. SCHOOLS—Common Schools—Latin and Greek—Injunction.——Under the common school law of Kentucky, Latin and Greek may lawfully be taught in the common schools of that State, and an injunction will not be granted to restrain the collection of school taxes because those languages are taught in the schools.—*Newman v. Thompson*, Ky. Ct. App., May 21, 1887; 4 S. W. Rep. 341.

214. SCHOOL TEACHER — Punishment. —— A school teacher may impose reasonable corporal punishment to enforce discipline, and is not liable for a mistake if he acts in good faith and without malice.—*Heritage v. Dodge*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 722.

215. SETTLEMENT—Damages—Contract — Agency.—— A settlement of a claim for damages for injury to property, by which one party agrees to pay a specified sum, less than the sum claimed, and the other to accept the same in full satisfaction, is a valid contract, obligatory on both parties. One who for several years has acted as agent for a corporation, settling claims against it, is *prima facie* the agent of such corporation.—*Neebles v. Minneapolis, etc. Co.*, S. C. Minn., June 16, 1887; 33 N. W. Rep. 332.

216. SET-OFF—Equity — Guardian and Ward. —— A ward against whom an account for foreclosure of a mortgage is pending in favor of one who was surety of the guardian, may set-off against such demand a balance due to the ward by the guardian upon the latter's final account, the guardian being insolvent. And such set-off will equally be allowed against the assignee of the mortgage debt who has notice of the facts.—*Rose v. Berkholm*, N. J. Ct. Ch., May 24, 1887; 9 Atl. Rep. 746.

217. SPECIFIC PERFORMANCE — Married Woman.—— Where, for a nominal consideration, husband and wife convey the wife's separate property to a party who sells it to another person, who refuses to accept the title because the wife received no valuable consideration for her land, and upon bill filed the husband and wife answer, disclaiming title and rectifying their deed, the vendee may be compelled to accept the title.—*Robinson v. Henning*, Ky. Ct. App., May 19, 1887; 4 S. W. Rep 322.

218. STATUTES — Constitutional Law — Reference to Title of Act.——In Arkansas, by constitutional provision, no statute can be amended, altered, or extended by a subsequent statute by mere reference to the title of the former act, but every part of the first statute so altered, amended or extended must be recited in full in the second act, and those parts of it which are preserved shall be duly re-enacted.—*Watkins v. City of Eureka Springs*, S. C. Ark., May 7, 1887; 4 S. W. Rep. 384.

219. STATUTES—Construction — Repeal — Implication—Tax Levies. ——A statute should be so construed as to give effect if possible to every clause of it. Statutes *in pari materia* should be construed together as one act. A

statute should not be held to be repealed by implication, unless its repugnancy to the latter statute is clear and unavoidable. Construction of Nebraska statutes, concerning tax levies.—*State ex rel. v. Babcock*, S. C. Neb., June 8, 1887; 33 N. W. Rep. 247.

220. STATUTES—Repugnancy — Validity.——The act dividing Cleveland county into two judicial districts is void, because it provides for holding the terms of both courts at the same time by the same judge.—*Ex parte Jones*, S. C. Ark., April 30, 1887; 4 S. W. Rep. 639.

221. STREET RAILWAY—Ordinance—Construction.——The ordinance of the city of Fort Worth, Texas, of 1874 and of 1882, construed, and the rights and liabilities of the street railway company and the powers of the city with reference thereto set forth and declared.—*Fort Worth, etc. Co. v. Rosedale, etc. Co.*, S. C. Tex., April 22, 1887; 4 S. W. Rep. 534.

222. SUBROGATION — Allowance. —— Where it is equitable that a person paying off the debt of another should be substituted in the place of the creditor, it is generally allowed.—*Yaple v. Stephens*, S. C Kan., June 11, 1887; 14 Pac. Rep. 222.

223. SURETY — Co-surety — Contribution — Attorney's Fee.——A surety having paid the note on which he was bound, is entitled to recover from each of his co-sureties his proportion of the note, but no recovery can be had of an attorney's fee provided for in the note but which plaintiff had not paid.—*Acers v. Curtis*, S. C. Tex., June 3, 1887; 4 S. W. Rep. 551.

224. SURETY—Release of—Payment by Surety.——A creditor may release a surety without thereby releasing the principal debtor. If a surety pays a certain sum for his release, leaving the obligation in full force against his principal, the creditor may collect from the latter the full amount of the debt without crediting the sum paid by the surety.—*McIlhenny v. Blum*, S. C. Tex., April 26, 1887; 4 S. W. Rep. 367.

225. SURFACE-WATER—Obstructing Flow — Injunction.——In a proceeding against a party for obstructing the natural flow of surface-water from plaintiff's land over defendant's, whether the defendant is making a reasonable use of his property, is to be considered with regard to the benefit he thereby derives and the injury resulting to others.—*Town of Rindge v. Sargent*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 723.

226. SURVEYS—Boundaries—Successive Grants.——A subsequent locator should not rely upon a single call in a previous survey of an adjoining grant to determine the boundary line, when that call is in conflict with the others.—*Davidson v. Killen*, S. C. Tex., June 3, 1887; 4 S. W. Rep. 561.

227. TAXATION—Assessment—Notice—Supreme Court.——Ten days' notice of an application to increase an assessment is not required, when the property owner is a non-resident. The supreme court cannot correct any irregularity in form, or illegality in assessing or levying the taxes.—*State v. Love*, N. J. Ct. Err. & App., November Term, 1886; 9 Atl. Rep. 744.

228. TAXATION — Illegal Exemptions — Correction — Process — Petition. ——Where property is illegally exempted from taxation, and no remedy is provided by law, it may be reassessed by petition stating the facts as in a common law pleading, under the common law power of general superintendence over courts of inferior jurisdiction, and this court may correct the error and make the assessment or cause it to be made.—*Boody v. Watson*, S. C. N. H., March 12, 1887; 9 Atl. Rep. 794.

229. TAXATION — Municipal Corporations — Railroads.——A grain elevator built on land conveyed to the united railroad and canal companies by act of 1886 is not subject to municipal taxation.—*State v. Jersey City*, S. C. N. J., June 22, 1887; 9 Atl. Rep. 782.

230. TAXATION—National Banks—Assessment—Remedial Statute.——It is competent for an assessor to assess the shares of all banks within his county at par. What irregularities in assessments for taxation can be cured by remedial statute subsequently passed, and upon what conditions.—*Williams v. Supervisors, etc.*, U. S. S. C., May 23, 1887; 7 S. C. Rep. 1124.

231. TAXATION — National Banks — Statute — Assessment.——The statute of New York, April 23, 1887, ch. 761, taxing national bank shares, is in conflict with the laws of the United States regulating State taxation of national banks. Rules controlling assessments and relief from overvaluation declared. The findings of fact by a circuit court of the United States, sitting as a jury, are final, and not reviewable in the supreme court.—*Stanley v. Supervisors, etc.*, U. S. S. C., May 2, 1887; 7 S. C. Rep. 1234.

232. TAXATION—National Bank Stock—Indebtedness.——An owner of national bank stock is taxable on the excess of the par value thereof above his interest-bearing indebtedness.—*Pearcy v. Town of Greenfield*, S. C. N. H., March 11, 1887; 9 Atl. Rep. 722.

233. TAXATION—Savings Banks—Statutes—Equity—Injunction.——The statute law of Michigan relative to taxation of savings banks construed. When a bank has been illegally taxed, and the effect of proceedings for the collection of the tax is to impede its business, equity will intervene by injunction.—*Lenawee, etc. Bank v. City of Adrian*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 304.

234. TAXATION—Statute.——Code of Iowa, § 801, relating to taxation of shares in mutual loan and building associations, construed. Ruling as to deduction of indebtedness.—*Bridgman v. City of Keokuk*, S. C. Iowa, June 16, 1887; 33 N. W. Rep. 355.

235. TAXATION—Tax-payer's Oath—Penal Statute.——The code of Iowa, § 823, prescribing a penalty of $100 against any one who refuses to take the oath which the tax assessor is required to administer, is to be construed strictly, being a penal statute. One cannot be convicted under that section unless the assessor had actually offered to administer the oath to the party.—*Marion County v. Krudenier*, S. C. Iowa, June 21, 1887; 33 N. W. Rep. 378.

236. TAXATION—Void Deed—Purchaser.——A defeated tax-title claimant may recover from the owner of the land the taxes justly due, which he has paid, with penalties, interest and costs, and is entitled to a lien on the land therefor, though his tax-deed is void on its face.—*Stetson v. Freeman*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 256.

237. TENANTS IN COMMON—Trover—Conversion.——If one tenant in common of a chattel sells it without authority, his co-tenant may maintain an action of trover against him.—*Perry v. Granger*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 261.

238. TOWNS—Borrowed Money — Liability — Meeting—Rescission.——An action will lie against a town for money borrowed by its officers for its officers for its benefit and applied to the payment of its debts when such action has been ratified by the town. Such ratification cannot be rescinded at a subsequent meeting. Town meetings held just outside the building by unanimous consent are valid, and the notice of the meeting may specify in one article all the notes and orders to be acted on.—*Brown v. Inhabitants of Winterford*, S. J. C. Me., March 10, 1887; 9 Atl. Rep. 844.

239. TRIAL—Agreement of Counsel—Depositions—Evidence — Custom — Fraudulent Conveyance. —— The agreements of counsel upon a trial are not contracts, and will be set aside if justice requires it. The deposition of a witness who is present at the trial cannot be read in evidence. Ruling on the subject of cattle brands in Texas. Ruling upon a question of fraud in fact and fraudulent intent.—*McClure v. Sheck*, S. C. Tex., June 7, 1887; 4 S. W. Rep. 552.

240. TRUST—Accounting—Credits—Compound Interest—Estoppel — Consideration — Evidence — Equity — Reforming Deed.——A husband and father who hold property in trust for his wife and children and uses it as his own, keeping no accounts, is liable for six per cent. interest, compounded annually. Such a trustee, although the property was originally his own, cannot set up that the deed declaring the trust was without con-

sideration. The recital of a deed cannot be contradicted by parol evidence showing a want of consideration for the deed. Equity will not reform a family trust to let in after-born children, where no mistake appears.—*Bobb v. Bobb*, S. C. Mo., June 7, 1887; 4 S. W. Rep. 511.

241. TRUST DEED—Defective Execution—Mortgage—Mistake—Extension—Consideration.——A trust deed duly acknowledged, but of which the grantor's signature was omitted by mistake, is nevertheless valid as a mortgage. And where land is omitted by mistake in a mortgage, and a judgment is subsequently rendered against the mortgagor, its lien is subject to the equity of the mortgage. Extension of time is a good consideration for a new note and a deed of trust.—*Martin v. Nixon*, S. C. Mo., October Term, 1886; 4 S. W. Rep. 503.

242. TRUST FUND—Conversion—Following.——A trust fund wrongfully converted can always be followed by the *cestui que trust*, so long as it can be identified, until it gets into the hands of a *bona fide* purchaser. When it is turned into money and mixed with a mass of other money, it can no longer be identified.—*Appeal of Hopkins*, S. C. Penn., May 30, 1887; 9 Atl. Rep. 867.

243. TRUST—Implied Trust—Acquiescence—Lapse of Time.——One who acquiring an equitable interest in land during her minority, and fails to assert it for twenty years after she has become *sui juris*, is barred by lapse of time. Relief will not be denied to persons claiming under an implied trust, who have long acquiesced in the adverse claim, although if timely application had been made relief would have been given.—*Hendrickson v. Hendrickson*, N. J. Ct. Ch., March Term, 1887; 9 Atl. Rep. 742.

244. TRUST—Power of Sale—Consent.——Where the consent of a third person to the execution of a power is requisite: *Held*, under code Alabama, 1876, § 2215, such consent is sufficiently expressed by the third persons joining in a deed executing the power, though not in terms referring to it.—*Gindrat v. Montgomery Gas-light Co.*, S. C. Ala., May 30, 1887; 2 South. Rep. 327.

245. VENDOR'S LIEN—Good Faith—Burden of Proof.——As between a vendor holding a lien for purchase money and the assignee of a mortgage, the mortgagee of which had notice of such lien, it is incumbent on the assignee to plead and prove his innocence of fraud and his good faith in the transaction, and for want of such pleading and proof the mortgage will be postponed to the lien.—*Seymour v. McKenstry*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 348.

246. VENDOR AND VENDEE — Contract — Estoppel — Vendor's Lien—Parties—Notice.——When one contracts to give certain notes for a tract of land and surrenders the notes, and without waiting for a deed from the vendor's deed sells and conveys the land to a third person, that person can compel the original vendor to convey the land to him. And where husband and wife mortgage several tracts of land and misdescribe two of them as the property of the wife, they being in fact the property of the husband, the mortgage is good as between the parties, but not as to third persons, as for instance, one who holds a vendor's lien on the lands so belonging to the husband, who can enforce his lien, even if he does not make the mortgagee a party to the suit.—*Johnson v. Hughart*, Ky. Ct. App., May 28, 1887; 4 S. W. Rep. 348.

247. WILL—Construction—Mortgage.——A devise to A for her life and her bodily heirs, if she should have any, and if not, then after her death to B, does not vest in A such an interest as would render valid a mortgage made by her in her life-time, as against her children after her death.—*Myer v. Snow*, S. C. Ark., May 7, 1887; 4 S. W. Rep. 381.

248. WILL—Void Remainder—Disposition.——Where, by will, the income of property is given to one for life with remainder to a charity, which remainder is void, the estate goes to the next of kin and not to the life tenant.—*Seiber's Appeal*, S. C. Penn., May 30, 1887; 9 Atl. Rep. 863.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY No. 5.

Is an attorney's fee for securing and collecting funds belonging to an estate, a claim against the estate, or a personal claim against the administrators who employed the attorney? A. L. A.

QUERIES ANSWERED.

QUERY No. 19 [24 *Cent. L. J. 383.*]

A, a minor, gets B to go on his note as surety. When the note becomes due A is of age, at which time he requests B to pay off the note and he will repay him. Can B recover of A? Cite authorities.

S. & B.

The contract of A to repay B if he will pay his debt, is supported by the moral obligation on A to pay that debt. 1 Parsons on Cont. (7th ed.), 460. An infant can always ratify such contracts on attaining his majority. *Idem.* 323; 1 Dan. Neg. Inst. §§ 230, 233.

R. M. S.

RECENT PUBLICATIONS.

A MANUAL OF COMMON LAW FOR PRACTITIONERS AND STUDENTS, Comprising the Fundamental Principles with Useful, Practical Rules and Decisions. By Josiah W. Smith, B.C.L., Q. C., author of "A Compendium of the Law of Real and Personal Property," "A Manual of Equity," etc. Tenth Edition by T. Tristram, LL. M. (*Cantab.*) of Lincoln's Inn, Esq. Barrister at Law. London: Stevens & Sons, 119 Chancery Lane, Law Publishers and Booksellers. 1887.

This is the tenth edition of a work which, in England, has received the most substantial proofs of the favor of the profession, or more properly, of those members of it to whom it is especially addressed, and for whose use it is particularly designed, students of law and their instructors. The object of the author is manifestly to furnish the student with as full and complete a compendium of the common law as was possibly compatible with the bulk of the volume, which is only 750 pages duodecimo. This work, the author says, is designed to be used as a companion to his "*Manual of Equity*, for many years used for examination by the Council of Legal Education, at Lincoln's Inn."

From the examination which we have been able to make of this work, we should think it well adapted for the use of students, and that it is well worthy of perusal by the junior members of the profession, and aspirants to that dignity in this country as well as in England.